TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 79

NATIONAL MAPE DEPOSIT, REVIVED AND TRUST CO., A CORPORATION, ETC., PLAINTIFF IN ERROR,

vs.

WILLIAM H. HUBBS.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED [illegible], 1913.

(22,228)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 79.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY OF THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

WILLIAM B. HIBBS.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1912.

1 In the Court of Appeals of the District of Columbia.

No. 1921.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Appellant,

vs.

WILLIAM B. HIBBS.

Supreme Court of the District of Columbia.

At Law. No. 47106.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Plaintiff,

vs.

WILLIAM B. HIBBS, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration, &c.

Filed August 1, 1904.

In the Supreme Court of the District of Columbia.

At Law. No. 47106.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Plaintiff,

vs.

WILLIAM B. HIBBS, Defendant.

The plaintiff, a corporation under the laws of the District of Columbia, sues the defendant,

I. For that whereas the said plaintiff heretofore, to wit, on the 1st day of June, 1904, was lawfully possessed as of its own property of a certain certificate of stock in a corporation organized under the laws of the State of New York, called the Mergenthaler Linotype Company—said certificate being numbered 1105 and being for twenty shares of stock in said last mentioned corporation, of
2 the par value of $100.00 each—of great value, to wit, of the value of $4,000.00, and being so possessed the plaintiff after-

wards, to wit, on the day and year above mentioned, at the District of Columbia, casually lost the said certificate out of its possession, and the same afterwards, to wit, on the day and year aforesaid, at the District of Columbia aforesaid, came into the possession of the said defendant by finding. Yet the said defendant, well knowing the said certificate to be the property of the said plaintiff, but contriving and intending to deprive the said plaintiff of its said property, has not as yet delivered the said certificate to the said plaintiff, although often requested so to do, and has hitherto wholly refused so to do; and afterwards, to wit, on the day and year aforesaid, at the District of Columbia, the defendant converted and disposed of the said certificate to his own use, to the damage of the plaintiff in the sum of four thousand dollars, wherefore it brings this suit.

And the plaintiff claims of and from the defendant under this count, four thousand dollars, with interest from the 1st day of June, 1904; besides costs of suit.

II. And for that whereas the said plaintiff heretofore, to wit, on the 1st day of June, 1904, was lawfully possessed as of its own property of a certain certificate of stock in a corporation organized under the laws of the State of New York, called the Mergenthaler Linotype Company—said certificate being numbered 669 and being for ten shares of stock in said last mentioned corporation, of the value of two thousand dollars, and being so possessed the plaintiff afterwards, to wit, on the day and year above mentioned, at the District of Columbia, casually lost the said certificate out of its possession, and the same afterwards, to wit, on the day and year aforesaid, at the District of Columbia aforesaid, came into the possession of the said defendant by finding. Yet the said defendant, well knowing the said certificate to be the property of the said plaintiff, and of right to belong and appertain to it, the plaintiff, but contriving and intending to deprive the said plaintiff of its said property, has not as yet delivered the said certificate to the said plaintiff, although often requested so to do, and has hitherto wholly refused so to do; and afterwards, to wit, on the day and year aforesaid, at the District of Columbia, the defendant converted and disposed of the said certificate to his own use, to the damage of the plaintiff in the sum of two thousand dollars, wherefore it brings this suit.

And the plaintiff claims of and from the defendant under this count two thousand dollars, with interest from the 1st day of June, 1904; besides costs of suit.

A. S. WORTHINGTON,
Attorney for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

A. S. WORTHINGTON,
Attorney for Plaintiff.

3 *Plea.*

Filed August 31, 1904.

In the Supreme Court of the District of Columbia.

No. 47106. At Law.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Plaintiff,
vs.
WILLIAM B. HIBBS, Defendant.

The defendant, for plea to the plaintiff's declaration in the above entitled cause filed, says that he is not guilty as alleged.

J. J. DARLINGTON,
Attorney for Defendant.

Joinder of Issue.

Filed September 23, 1904.

In the Supreme Court of the District of Columbia.

No. 47106. At Law.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Plaintiff,
vs.
WILLIAM B. HIBBS, Defendant.

The plaintiff hereby joins issue on the defendant's plea to the plaintiff's declaration.

A. S. WORTHINGTON,
Attorney for Plaintiff.

To J. J. Darlington, Esq., attorney for the defendant:

Please take notice that the issue joined in the above entitled case will be tried at the next term of court.

A. S. WORTHINGTON,
Attorney for Plaintiff.

4

Note of Issue.

Filed September 23, 1904.

In the Supreme Court of the District of Columbia.

No. 47106. At Law.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Plaintiff,
vs.
WILLIAM B. HIBBS, Defendant.

A. S. Worthington, Attorney for Plaintiff.
J. J. Darlington, Attorney for Defendant.
Last pleading filed September 23, 1904.

Stipulation and Agreed Statement of Facts.

Filed May 12, 1908.

In the Supreme Court of the District of Columbia.

No. 47106. Law.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY
vs.
WILLIAM B. HIBBS.

It is hereby stipulated by the parties to the above cause, by their respective attorneys, that the same shall be submitted to the court for its judgment, subject to the right of either party to appeal therefrom, upon the statement of facts hereto annexed, with like effect as if the said statement of facts were the findings of a special verdict of a jury in the cause, the actual empaneling of a jury therein being hereby waived.

CHARLES L. FRAILEY,
Att'y for Plaintiff.
JOSEPH J. DARLINGTON,
Attorney for Defendant.

Agreed Statement of Facts.

Willard H. Myers was employed by the plaintiff company in the year 1882 on the recommendation of his brother-in-law, Charles E. Nyman, at that time also employed by the plaintiff company as Assistant Secretary and for the last five years, Secretary of the said plaintiff company. The said Willard H. Myers, until the 28th day May, 1904, was continuously employed by the plaintiff company, and was, at said time and for about ten years prior thereto, general

bookkeeper and assistant note teller of plaintiff company.
5 The plaintiff company for over twenty years has been engaged in a general banking business and also as a safe deposit company, and in the course of its said business was accustomed to make loans to its customers on promissory notes secured by collateral consisting of stocks and bonds as well as real estate, and, to a limited extent, to buy and sell stocks and bonds for its customers and occasionally for itself, and was engaged in such business in 1904.

The said Willard H. Myers during the said period of his employment by the plaintiff company, to wit: from 1882 to about May 26th, 1904, had committed no act or acts inconsistent with his duty to the plaintiff company as his employer, and was trusted as a faithful employé during the whole period of his employment and up to the time of the happening of the circumstances hereinafter related, by the officers of the plaintiff company, including said Nyman and by Thomas R. Jones, President of the plaintiff company during the latter's association with the said company, covering a period of about fourteen years.

In 1904, and for ten or more years prior thereto, a part of the said Myers' duties *were* to make entries in the cash book of the plaintiff company and to act as note teller in the absence of the regular note teller and to receive from one of the officers of the plaintiff collateral securities for the purpose of delivering the same to such customer as might be entitled thereto upon payment by him of his loans secured by such collateral. The said Willard H. Myers had no authority, and it was no part of his employment or his duties to pledge, sell, or otherwise dispose of any stock, bonds or other collateral pledged with the plaintiff company to secure any loan made by it, or to sell, pledge, or otherwise dispose of any stock, bonds or other property of the plaintiff company or its customers.

On the 12th day of March, 1903, one T. M. Kelley procured a loan from the plaintiff company in the sum of $12,500.00 for which he gave his promissory note to the order of the plaintiff company on demand after date, with interest at 4% per annum until paid, and deposited and pledged with the plaintiff company as collateral security for the payment of said loan, certificates of capital stock of the Mergenthaler Linotype Company representing 100 shares. Among said certificates was one *h*umbered 1105, representing twenty shares, and another numbered 669, for ten shares of said capital stock. Each of said certificates of stock stood in the name of T. M. Kelley, and each, on its face, recited that it was transferable by the party in whose name it stood, in person or by attorney, only upon the books of the said Mergenthaler Linotype Company, upon surrender of said certificate, and each contained upon the back thereof a blank assignment or power of attorney to transfer said stock upon the books of said company, which said blank assignment or power of attorney was signed in blank by said T. M. Kelley, whose signature was duly attested, and said certificates numbered 1105 and 669 were in that condition when pledged and delivered to the plaintiff company to secure payment of the above described note of the said T. M. Kelley, and given by him for the loan hereinbefore stated. At that time,

6 for many years previously, and thence hitherto, possession of stock certificates so assigned in blank and attested, was by the custom of banks, brokers and others dealing therein, and which custom was known to the plaintiff, recognized and accepted, in the absence of knowledge or cause of suspicion to the contrary, as evidence of ownership or authority to sell, pledge or otherwise deal therewith as an owner might do.

On Thursday, May 26th, 1904, said Myers went to said Nyman, secretary of the plaintiff company, and requested him to procure from the vault of the plaintiff company, where it kept all the collateral securities pledged with it by its customers, the said collateral consisting of the 100 shares of the Mergenthaler stock above mentioned, deposited by said Kelley so as aforesaid to secure the plaintiff's said loan to him. Similar requests for collateral security had often been made by said Myers at prior times, it being usual in the ordinary course of business for the plaintiff company to deliver to him as its note teller, upon his request, collateral securities for the purpose of delivering same to the owner thereof when he was ready to pay his loan and receive his collateral. The said secretary Nyman, upon request of said Myers, thereupon procured the said 100 shares of Mergenthaler stock, including certificates numbered 1105 and 669, for twenty and ten shares of said Mergenthaler stock, respectively, and delivered the whole to said Myers in accordance with the usual course of business of plaintiff company, for the purpose of having same delivered to said Kelley, it being, as aforesaid, at that time part of the duty of said Myers as assistant note teller, or as acting note teller, to procure from one of the officers of the Company having access to its vault, and to deliver to customers paying their loans the collateral security pledged for the same, and to receive the money from said customers and to enter such payment upon the cash book of said plaintiff company.

Said Kelley was not in the plaintiff company's bank at the time and did not request delivery of said stock to him, or pay the said note of $12,500.00, and the same is now in the possession of the plaintiff and has not been paid by said Kelley, who has, however, paid the interest due on the said note until the present time. No entry was ever made by said Myers of said transaction in the cash book, and nothing was paid or done by said Kelley to form the basis of any entry.

On Friday, May 27th, said Myers went to the office of the defendant, there saw the defendant's cashier, one W. T. Cox, delivered to said Cox said certificates of Mergenthaler stock numbered 1105 and 669, above described, and stated that he wished defendant to sell said stock for him. Defendant was at that time engaged in the business of a stock borker, with offices situated at No. 1419 F Street, Northwest, in the City of Washington, and was employing said Cox as his cashier in the conduct of said business. The said Myers at the time he so delivered the said certificates numbered 1105 and 669 to the defendant for sale on his acount, at the request of the said Cox, and in accordance with the usual custom in such cases, where the signature of the assignor and of the attesting witness are un-

known to the broker, signed his own name to the attestation clause of the assignment or power of attorney endorsed on each of the
7 said certificates of stock, as a further identification of the signatures of the said Kelley and of the original attesting witness, whose signatures were unknown to the said Cox. The defendant was out of the city at that time, and the said certificates were turned over to one George W. E. Slater, a stock broker, to sell in the place of the defendant on the stock exchange in this city. The said two certificates of stock were thereupon sold on said day, certificate numbered 1105 being bought by one W. J. Flathers and certificate numbered 669 by one Walter Heiston. Said stock was paid for by the purchasers on the last mentioned day, to wit: Friady, May 27th, 1904, and said Myers was paid therefor by check of W. B. Hibbs and Company, the firm name under which said defendant was conducting his business, said check being drawn on the Riggs National Bank for the sum of $5205.00, being the amount of the proceeds received from the sale of said certificates of stock. The market value of said stock was on Friday, May 27th, 1904, $173.50 per share. At the time said Myers brought said stock to the office of the defendant to be sold by him nothing was said by said Myers to indicate that he did not own said stock, and neither did the defendant nor his cashier, said Cox, know, suspect, or have cause to suspect that the stock did not belong to him, said Myers. Said Myers took the said check of W. B. Hibbs and Company and cashed it on Saturday, May 28th, 1904, at the Riggs National Bank. Said Myers did not represent to said Cox that he was selling said stock for the plaintiff, or that he was acting for plaintiff in any way, and he was in fact selling said stock and the same was sold without the knowledge or consent of the plaintiff, and without the knowledge or consent of the said T. M. Kelley. Of the remaining shares of the said stock, ten shares were in like manner sold for the said Myers by or through the defendants aforesaid, and the purchase money paid to the said Myers; fifty shares were hypothecated by the said Myers as security for a loan of $3,500.00 obtained by him from the American Security and Trust Company, on the faith of the said security; and the remaining ten shares were subsequently recovered from the said Myers, being by him surrendered to the authorities.

Supreme Court of the District of Columbia.

TUESDAY, *May* 12, 1908.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 47106.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Pl't'f,

vs.

WILLIAM B. HIBBS, Def't.

Now come here as well the plaintiff by its Attorneys Messrs. Worthington, Heald and Frailey, as the defendant by his Attorney

Mr. J. J. Darlington, and file a stipulation in writing with the Clerk of the Court waiving a trial by jury; whereupon after
8 hearing the evidence in the case, the Court finds the matters of difference between the parties in favor of the defendant; Therefore it is considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of his defense, to be taxed by the Clerk, and have execution thereof, to all of which the plaintiff excepts.

The plaintiff notes an appeal to the Court of Appeals of the District of Columbia, and upon motion, the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100.).

Memorandum.

May 20, 1908.—Appeal bond filed.

Supreme Court of the District of Columbia.

WEDNESDAY, *June* 3, 1908.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 47106.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, Pl't'f,
vs.
WILLIAM B. HIBBS, Def't.

Now comes here the plaintiff by its Attorney and prays the Court to sign, seal and make part of the record, its bill of exceptions taken during the trial of this cause now for then, which is acordingly done.

Bill of Exceptions.

Filed June 3, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 47106.

NATIONAL SAFE DEPOSIT, SAVINGS & TRUST COMPANY
vs.
WILLIAM B. HIBBS.

Be it remembered that at the trial of this case had on the 12 day of May, 1908, before the Honorable Daniel T. Wright, Associate Justice of the said Court, without a jury, the plaintiff, to maintain the issues on its part joined, produced in evidence an agreed statement of facts, duly agreed to by the plaintiff and the defendant

through their respective counsel, which is in the words and figures, following, to wit:

9 At Law. No. 47106.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY
vs.
WILLIAM B. HIBBS.

Agreed Statement of Facts.

Willard H. Myers was employed by the plaintiff company in the year 1882 on the recommendation of brother-in-law, Charles E. Nyman, at that time also employed by the plaintiff company as Assistant Secretary and for the last five years, Secretary of the said plaintiff company. The said Willard H. Myers, until the 28th day of May, 1904, was continuously employed by the plaintiff company, and was, at said time, and for about ten years prior thereto, general bookkeeper and assistant note teller of plaintiff company. The plaintiff company for over twenty years has been engaged in a general banking business and also as a safe deposit company, and in the course of its said business was accustomed to make loans to its customers on promissory notes secured by collateral consisting of stocks and bonds as well as real estate, and to a limited extent to buy and sell stocks and bonds for its customers and occasionally for itself, and was engaged in such business in 1904.

The said Willard H. Myers during the said period of his employment by the plaintiff company, to wit: from 1882 to about May 26th, 1904, had committed no act or acts inconsistent with his duty to the plaintiff as his employer, and was trusted as a faithful employé during the whole period of his employment and up to the time of the happening of the circumstances hereinafter related, by the officers of the plaintiff company, including said Nyman, and by Thomas R. Jones, President of the plaintiff company during the latter's association with the said company covering a period of about fourteen years.

In 1904, and for ten or more years prior thereto, a part of the said Myers' duties *were* to make entries in the cash book of the plaintiff company and to act as note teller in the absence of the regular note teller and to receive from one of the officers of the company collateral security for the purpose of delivering the same to such customer as might be entitled thereto upon payment by him of his loans secured by such collateral. The said Willard H. Myers had no authority, and it was no part of his employment or his duties, to pledge, sell, or otherwise dispose of any stocks, bonds or other collateral pledged with the plaintiff company to secure any loan made by it, or to pledge, sell or otherwise dispose of any stocks, bonds or other property of the plaintiff company or its customers.

On the 12th day of March, 1903, one T. M. Kelley procured a loan from the plaintiff company in the sum of $12,500 for which he gave his promissory note to the order of the plaintiff company on

demand after date, with interest at 4% per annum until paid, and deposited and pledged with the plaintiff company as collateral security for the payment of said loan, certificates of capital stock of the Mergenthaler Linotype Company representing 100 shares. Among said certificates was one numbered 1105, representing twenty (20) shares, and another, numbered 669, for ten (10) shares of said capital stock. Each of said certificates of stock stood in the name of said T. M. Kelley, and each, on its face, recited that it was transferable by the party in whose name it stood, in person, or by attorney, only upon the books of the said Mergenthaler Linotype Company, upon surrender of said certificate, and each contained upon the back thereof a blank assignment or power of attorney to transfer said stock upon the books of said company, which said blank assignment or power of attorney was signed in blank by said T. M. Kelley, whose signature was duly attested, and said certificates numbered 1105 and 669 were in that condition when pledged and delivered to the plaintiff company to secure payment of the above described note of said T. M. Kelley, and given by him for the loan hereinabove stated. At that time, for many years previously, and thence hitherto, possession of stock certificates so assigned in blank and attested, was by the custom of banks, brokers and others dealing therein, and which custom was known to the plaintiff, recognized and accepted, in the absence of knowledge or cause of suspicion to the contrary, as evidence of ownership or authority to sell, pledge or otherwise deal therewith as an owner might do.

On Thursday, May 26th, 1904, said Myers went to Nyman, Secretary of the plaintiff company, and requested him to procure from the vault of the plaintiff company, where it kept all the collateral securities pledged with it by its customers, the said collateral consisting of the 100 shares of the Mergenthaler stock above mentioned, deposited by said Kelley as aforesaid to secure the plaintiff's said loan to him. Similar requests for collateral security had often been made by said Myers at prior times, it being usual in the ordinary course of business for the plaintiff company to deliver to him as its note teller, upon his request, collateral securities for the purpose of delivering same to the owner thereof, when he was ready to pay his loan and receive his collateral. The said secretary, Nyman, upon request of said Myers, thereupon procured the said 100 shares of Mergenthaler stock, including certificates numbered 1105 and 669, for twenty (20) and ten (10) shares of said Mergenthaler stock, respectively, and delivered the whole to said Myers in accorance with the usual course of business of said plaintiff company for the purpose of having same delivered to said Kelly, it being, as aforesaid, at that time part of the duty of said Myers as assistant note teller or acting note teller to procure from one of the officers of the plaintiff company having access to its vault, and to deliver to customers paying their loans, the collateral security pledged for the same, and to receive the money from said customers and to enter such payment upon the cash book of said plaintiff company.

Said Kelly was not in the plaintiff's bank at the time and did not request delivery of said stock to him, or pay the said note of $12,500 and the same is now in the possession of the plaintiff company and has not been paid by said Kelly, who has, however, paid the
11 interest due on the said note until the present time. No entry was ever made by said Myers of said transaction in the cash book, and nothing was paid or done by said Kelly to form the basis of any entry.

On Friday, May 27th, said Myers went to the office of the defendant, there saw the defendant's cashier, one W. T. Cox, delivered to said Cox said certificates of Mergenthaler linotype stock numbered 1105 and 669, above described, and stated that he wished the defendant to sell said stock for him. Defendant was at that time engaged in the business of a stock broker, with offices situated at 1419 F Street, Northwest, in the City of Washington and was employing said Cox as his cashier in the conduct of said business. The said Myers at the time he so delivered the said certificates numbered 1105 and 669 to the defendant for sale on his account, at the request of the said Cox, and in accordance with the usual custom in such cases where the signature of the assignor and of the attesting witness are unknown to the broker, signed his own name to the attestation clause of the assignment or power of attorney endorsed on each of the said certificates of stock, as further identification of the signatures of the said Kelly and of the original attesting witness, whose signatures were unknown to the said Cox. The defendant was out of the city at that time, and the said certificates were turned over to one George W. E. Slater, a stock broker, to sell in the place of the defendant on the stock exchange in this city. The said two certificates of stock were thereupon sold on said day, certificate numbered 1105 being bought by one W. J. Flathers and certificate numbered 669 by one Walter Heiston. Said stock was paid for by the purchasers on the last mentioned day, to wit: Friday, May 27th, 1904, and said Myers was paid therefor by check of W. B. Hibbs and Company, the firm name under which said defendant was conducting his business, said check being drawn on the Riggs National Bank for the sum of $5205.00, it being the amount of the proceeds received from the sale of said certificates of stock less the broker's commission for selling same. The market value of said stock was on Friday, May 27th, 1904, $173.50 per share. At the time said Myers brought said stock to the office of the defendant to be sold by him nothing was said by said Myers to indicate that he did not own said stock, and neither did the defendant nor his cashier, said Cox, know, suspect, or have cause to suspect that the stock did not belong to him, said Myers. Said Myers took the said check of W. B. Hibbs and Company and cashed it on Saturday, May 28th, 1904, at the Riggs National Bank. Said Myers did not represent to said Cox that he was selling said stock for the plaintiff, or that he was acting for plaintiff in any way, and he was in fact selling said stock and the same was sold without the knowledge or consent of the plaintiff, and without the knowledge or consent of said T. M. Kelly. Of the remaining shares of said stock, ten shares were in like manner

sold for the said Myers by or through the defendants aforesaid, and — the purchase money paid to the said Myers, fifty shares were hypothecated by the said Meyers as security for a loan of $5,500.00 obtained by him from the American Security and Trust Company, on the faith of the said security; and the remaining ten shares
12 were subsequently recovered from the said Myers, being by him surrendered to the authorities.

The foregoing was all the evidence in the case. Whereupon the plaintiff, by its counsel, moved the Court to declare and find as a matter of law, upon the foregoing agreed statement of facts, that the plaintiff was entitled to a judgment against the defendant for the sum of $5,205.00, with interest from the first day of June, 1904. But the Court overruled said motion, to which ruling of the Court overruling said motion, the plaintiff, by its counsel, then and there duly excepted. Thereupon the Court found the issues joined between the parties in favor of the defendant, to which finding the plaintiff, by its counsel, then and there duly excepted. Counsel for plaintiff now prays the Court to sign the foregoing bill of exceptions in order that the same may be made a matter of record, which is accordingly done this 3d day of June, 1908, now and for then.

DAN THEW WRIGHT, *Justice.*

Settled by consent,

CHARLES L. FRAILEY,
Of Counsel for Plaintiff.

J. J. DARLINGTON,
For Defendant.

Directions to Clerk for Preparation of Transcript of Record.

Filed June 4, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 47106.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY
vs.
WILLIAM B. HIBBS.

The clerk of the Court will please include the following papers in the transcript of record in the above cause.

1. Declaration.
2. Plea.
3. Joinder of issue.
4. Notice of trial and Note of Issue.
5. Stipulation of Counsel Waiving a Jury, etc.
6. Finding and Judgment of Court and Appeal noted therefrom.
7. Bill of exceptions.

CHARLES L. FRAILEY,
Of Counsel for Plaintiff.

13 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 22 both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47106 At Law, wherein National Safe Deposit, Savings and Trust Company, of the District of Columbia, is Plaintiff, and William B. Hibbs is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2nd day of July, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1921. National Safe Deposit, Savings and Trust Company, of the District of Columbia, appellant, vs. William B. Hibbs. Court of Appeals, District of Columbia. Filed Jul- 2, 1908. Henry W. Hodges, clerk.

14 THURSDAY, *December 3rd, A. D.* 1908.

No. 1921.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Appellant,

vs.

WILLIAM B. HIBBS.

The argument in the above entitled cause was commenced by Mr. C. L. Frailey, attorney for the appellant, and was continued by Mr. J. J. Darlington, attorney for the appellee, and was concluded by Mr. A. S. Worthington, attorney for the appellant. On motion the appellant is allowed to file additional authorities herein if so advised.

No. 1921.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Appellant,

vs.

WILLIAM B. HIBBS.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

This is an action to recover the value, alleged at $6,000, of certain shares of stock wrongfully taken from the Trust Company, plaintiff, and sold by the taker through the agency of the defendant Hibbs.

A jury was waived, and the case submitted to the court upon an agreed statement of facts.

The material facts are the following:

The plaintiff, Trust Company, had been engaged for more than twenty years in a general banking business, and was accustomed to make loans to customers on notes secured by collateral consisting of stocks, bonds, and real estate. To a limited extent it bought and sold bonds and stocks for customers, and occasionally for itself.

Willard H. Myers was employed by plaintiff in 1882 and remained so employed until May 28, 1904. He was general bookkeeper and assistant note teller. He had, prior to the act in question, committed no act inconsistent with his duties, and was trusted as a faithful employee. A part of Myers' duty during the last ten years of his employment was to make entries in the plaintiff's cashbook and act as note teller in the absence of the note teller; to receive from one of the plaintiff's officers collateral securities for the purpose of delivering the same to customers entitled thereto by payment of the loans secured thereby. He had no authority, and it was no part of his duty to pledge, sell, or otherwise dispose of any stock, bonds, or other collateral pledged with the plaintiff to secure loans; or to sell, pledge, or otherwise dispose of any stocks, bonds or other property of the plaintiff or its customers.

On March 12, 1903, one T. M. Kelley procured a loan from plaintiff of $12,500, for which he gave his note to plaintiff due on demand. To secure the note he deposited with plaintiff certain certificates of the Mergenthaler Linotype Company representing in all 100 shares of its capital stock. One certificate, No. 1105, represented twenty shares; one, No. 669, represented ten shares. Each certificate was in the name of T. M. Kelley and recited that it was transferable only on the books of the corporation, by the person in whose name it stood, or by his attorney upon surrender of said certificate. Each contained on its back a blank assignment and power of attorney to transfer said stock upon the books of the corporation. These were signed by said Kelley, whose signature was duly attested. "At that time, for many years previously, and thence hitherto, possession of stock certificates so assigned in blank and attested, was by the custom of banks, brokers, and others dealing

therein, and which custom was known to the plaintiff, recognized and accepted, in the absence of knowledge or cause of suspicion to the contrary, as evidence of ownership or authority to sell, pledge, or otherwise deal therewith as an owner might do." On Thursday, May 26, 1904, Myers requested the secretary of the plaintiff to procure from the vault where were kept all of the collateral securities of the plaintiff, the said collateral deposited by Kelley as aforesaid. Similar requests had often, prior thereto, been made by Myers, it being usual in the ordinary course of the business for the plaintiff to deliver to Myers, upon his request, collateral securities for the purpose of delivery to the owner when ready to pay his loan. The secretary was the brother-in-law of Myers. He, in compliance with the request, procured the collateral aforesaid (the whole 100 shares) and delivered the same to Myers for the purpose of having the same returned to Kelley. It was part of Myers' duty to receive payment of notes and enter such payments upon the cashbook of
16 the plaintiff. Kelley was not in the bank at the time of the request, did not offer to pay his note, and did not ask for return of his collateral stock. No entry was made of payment in the cash book, and nothing was done by said Kelley to form the basis of any entry. "On Friday, May 27th, Myers went to the office of the defendant, there saw the defendant's cashier, one W. T. Cox, delivered to said Cox said certificates of Mengenthaler stock numbered 1105 and 669, above described, and stated that he wished defendant to sell said stock for him. Defendant was at that time engaged in the business of a stockbroker, with offices situated at No. 1419 F street northwest, in the city of Washington, and was employing said Cox as his cashier in the conduct of said business. The said Myers at the time he delivered the said certificates numbered 1105 and 669 to the defendant for sale on his account, at the request of the said Cox, and in accordance with the usual custom in such cases, where the signature of the assignor and of the attesting witness are unknown to the broker, signed his own name to the attestation clause of the assignment or power of attorney endorsed on each of the said certificates of stock, as a further identification of the signatures of the said Kelley and of the original attesting witness, whose signatures were unknown to the said Cox. The defendant was out of the city at that time, and the said certificates were turned over to one George W. E. Slater, a stockbroker, to sell in the place of the defendant on the stock exchange in this city. The said two certificates of stock were thereupon sold on said day, certificate numbered 1105 being bought by one W. J. Flathers and certificate numbered 669 by one Walter Heiston. Said stock was paid for by the purchasers on the last mentioned day, to wit, Friday, May 27, 1904, and said Myers was paid therefore by check of W. B. Hibbs and Company, the firm name under which said defendant was conducting his business, said check being drawn on the Riggs National Bank for the sum of $5,205, being the amount of the proceeds received from the sale of said certificates of stock. The market value of said stock was on Friday, May 27, 1904, $173.50 per share. At the time said Myers brought said stock to the office of the defendant to be sold by

him nothing was said by Myers to indicate that he did not own said stock, and neither did the defendant nor his cashier know, suspect, or have any cause to suspect that the stock did not belong to him, said Myers. Said Myers took the said check of W. B. Hibbs and Company and cashed it on Saturday, May 28, 1904, at the Riggs National Bank. Said Myers did not represent to said Cox that he was selling said stock for the plaintiff, or that he was acting for plaintiff in any way, and he was in fact selling said stock and the same was sold without the knowledge or consent of the plaintiff, and without the knowledge or consent of the said T. M. Kelley. Of the remaining shares of the said stock, ten shares were in like manner sold for the said Myers by or through the defendants aforesaid, and the purchase money paid to the said Myers; fifty shares were hypothecated by the said Myers as security for a loan of $3,500 obtained by him from the American Security and Trust Company, on the faith of the said security; and the remaining ten shares were subsequently recovered from the said Myers, being by him surrendered to the authorities."

On the foregoing facts the court entered judgment for the defendant, Hibbs, and plaintiff has appealed therefrom.

It appears from the agreed statement of facts that the purchasers of the stock in question were known to the plaintiff, and presumably might have been joined in the action, which is against Hibbs, the innocent agent in whose hands the stock was placed by the wrongdoer for sale. Before considering the question of the liability of the agent, as such, we think it important to consider whether the title actually passed to the purchasers as against the plaintiff. If it did, then the question arises whether the agent is liable for the conversion notwithstanding that fact.

It is well settled that certificates of stock are not negotiable instruments. At the same time they are so constantly used as collateral and passed from hand to hand, when the blank transfer and power of attorney on their backs has been formally executed by the party to whom they were issued, that the general custom in the city of Washington, as we have seen, is to regard the holder as the owner for the purpose of selling or pledging them. As has been said by the Supreme Court of the United States, in the case of National Bank stock, but in words equally applicable to the stock of all ordinary corporations:

"The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage. It is in obedience to this requirement, that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial actions in all the large cities of the country, and are sold in open market the same as other securities.

Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations—and the assumption is a safe one—it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates." Bank v. Lanier, 11 Wall., 369, 377; Earle v. Carson, 188 U. S., 42, 46.

This facility of commercial use, and its constant exercise, of such indorsed stocks by way of pledge and sale, accounts for the usage heretofore mentioned as general and well known to the
17 plaintiff—a usage that rather follows the established law than sets up a new and independent rule governing such transactions. Of course usage can not overturn a rule of law and create a new class of negotiable instruments unknown to the law. "It simply fixes the meaning of an ambiguous expression, for the purpose of determining whether it is open to the former owner to deny that the property in the paper and the equitable benefit of the promise have passed to another." Scallons v. Rollins, 179 Mass., 346, 353. While, therefore, certificates of stock, indorsed as in this case, do not become negotiable instruments in a strictly legal sense, they, nevertheless, so approximate them as that the ordinary rules of agency and estoppel, which apply in the case of chattels, are applied to them with great liberality in the behalf of an innocent purchaser. And notwithstanding the fact that transfers of stock, to be perfect in every respect, may be required by the corporation charter to be registered upon the books of the corporation, the assignee of stock, upon delivery with transfer and power of attorney to transfer on the books, that has been formally executed by the party in whose name it stands, takes the entire equitable, if not the legal title thereto. With some conflict of authority, it is the generally accepted doctrine that the requirement of transfer on the books of the corporation is intended for its convenience and security alone. Such is the rule in this jurisdiction. Black v. Zacharie, 3 How., 483, 513; Johnson v. Laflin, 103 U. S., 800, 804; National Bank v. Watertown Bank, 105 U. S., 217, 222; Leyson v. Davis, 170 U. S., 36, 40.

It is well established law that where a named owner of a stock certificate executes a transfer thereof in blank and delivers it to a broker or an agent for certain limited purposes, and that broker or agent, in violation of his duty and obligation to the depositor, delivers it to another person without notice and for a valuable consideration,

the purchaser takes a good title. McNeill v. Tenth National Bank, 46 N. Y., 325; Cowdrey v. Vanderbergh, 101 U. S., 572, 575; Nat. Safe Dep. & Sav. Co. v. Gray, 12 App. D. C., 276, 287; Russell v. American Bell Telephone Co., 180 Mass., 467, 469; Pennsylvania R. R. Co., Appeal, 86 Pa. St., 80, 83; Burton's Appeal, 93 Pa. St., 214.

On the other hand, it is a general rule of law that where stock certificates so indorsed, have been stolen from the owner, without culpable negligence on his part, an innocent purchaser from the thief or his assignee does not take the title. East Birmingham Land Co. v. Dennis, 85 Ala., 565, 568, and cases there cited; Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St., 367; O'Herron v. Gray, 168 Mass., 573; Scallons v. Rollins, 173 Mass., 275, 279; Knox v. Eden Musee Co., 148 N. Y., 441, 456.

It is also a general principle applicable in law as well as in equity, where no settled rule of law intervenes to prevent its operation in a particular case, that where a loss has occurred through the wrongful action of a third person, and must be borne by one of two innocent persons, the one who by his negligence or inadvertence has placed it in the power of the third person to perpetrate the wrong, must suffer the consequences. Lickbarrow v. Mason, 2 D. & E., 70; Carusi v. Savary, 6 App. D. C., 330, 344; Fifth Cong. Church v. Bright, 28 App. D. C., 229, 239; Central Nat. Bank v. Met. Nat. Bank, 31 App. D. C., 391.

In the light of the foregoing principles, as applied to the agreed facts in this case, we come to the determination of the question, whether the plaintiff can set up a title to the stock superior to that of the innocent purchaser.

This is not the plain case of certificates intrusted to an agent or creditor as security for a particular purpose and fraudulently disposed of by him for another, under the general power enabling him so to do, so as to bring it directly within the principle illustrated by the case of McNeill v. Bank, supra, and other cases cited. Nor, on the other hand, is it a plain case of theft, without negligence of the owner and custodian, so as to bring it directly within the principle of East Birmingham Land Co. v. Dennis, supra, and cases cited therewith. On the whole, however, giving due allowance to the character and values of the paper and the general usage of the business in relation thereto in which the Trust Company was engaged also, we are of the opinion that the analogy in this case is with the former rather than the latter. The importance of the question, the forcible argument on behalf of the appellant, and the well considered cases on which he relies render a review of the latter important if not necessary. The case most strongly relied on and which presents the greatest difficulty, is that of Knox v. Eden Musee Co., 148 N. Y., 441, decided by the same court that had decided McNeill v. Nat. Bank.

One Jurgens was a clerk and manager of the corporation. It was his duty, among other things, to cancel surrendered certificates of stock, paste them in the certificate book, prepare new ones, obtain the signature of the president, and impress the seal upon

them before delivery to the proper person. In all previous cases the president had only signed new certificates when the cancelled ones were exhibited to him, as pasted in the book. In the particular case, certificates for twenty-four shares belonged to a firm of which the president of the company was a member. The president, acting for his firm, agreed to sell them to one Siebrecht for $114 per share. He took the certificates indorsed in blank to the office, but hearing that the purchaser was not then ready to pay he left them in the office safe, to which Jurgens had a key, with direction to be cancelled when paid for. About three weeks thereafter, the payment was made, and the purchaser's check, with a new certificate which lacked only the president's signature, was sent by Jurgens to the president, to be signed by him. He accepted the check, signed the new certificate as president, and returned it to Jurgens. Jurgens did not cancel the old certificates and paste them in the book. They remained in the safe when the new certificates were issued and delivered. Later, Jurgens fraudulently took them from the safe and delivered them to Knox, who had no notice, as collateral security for a loan. The trial court held that the defendant was estopped to deny the ownership of Knox. That judgment was reversed The court distinguished the case from McNeill v. Bank, holding that Jurgens was not the agent of the company for the purpose of issuing the surrendered certificates, and that the company had never placed them in his possession or invested him with the indicia of ownership. That he had access to the safe as a mere servant
18 of the corporation, and committed a crime in taking possession of and using them. It was also held that the corporation was not guilty of negligence that would entitle Knox to recover. Without undertaking to approve or disapprove the decision on the facts presented, we think that those facts distinguish the case from the one in hand as readily as from that of McNeill v. Bank. While Jurgens was an officer of the corporation and had access to its safe, the certificates were never delivered or intrusted to him for any purpose. As indicated in the opinion of the court, he committed a crime, apparently larceny, in taking them into his possession. It is to be remembered that a corporation can only act by agent. In the present case, Myers had no opportunity to take the certificates from the vaults, but he was the agent of the bank to receive them from another officer and return them to the owner upon the discharge of his debt. It was the custom of that officer to commit them to him for that purpose. His possession was fraudulently acquired, and while his act was probably not technically larceny, it amounted to embezzlement under the Code. Section 834. Whatever it may be, technically, is not material in the disposition of this case. Russell v. American Bell Telephone Co., 180 Mass., 464, 469. In that case it was said by Chief Justice Holmes: "In order to avoid the intimations of Scallons v. Rollins, 179 Mass., 346, the plaintiff sets up that in this case only the possession of the certificate, not the property, passed to the agent, and that, as the possession was obtained by fraud, it was obtained by larceny in judgment of law. In Scallons v. Rollins it is admitted

that the general principle there laid down would not apply to an instrument indorsed in blank and stolen before it had been transferred. We shall not examine the premises of this defense because we can not accept the conclusion. The qualification of the rule, as not applying when the instrument is stolen, is not based upon the agent's crime, but upon the fact that in the ordinary and typical case of theft the owner has not intrusted the agent with the document, and, therefore, is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough if the estoppel is based upon the principle that when one of two innocent persons is to suffer the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But in a case like the present the agent has been intrusted with the converted property, and it is totally immaterial whether, by a stretch which extends larceny beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present and the estoppel arises." In that case the plaintiff's testatrix, a very old woman, had eight shares of stock of the company, and had notice of the intention of the company to increase its stock and of the right of holders to subscribe for the same in proportion to their present holdings. The broker, Gleason, called on testatrix, informed her of her right to the new stock, and offered to attend to the matter for her by surrendering her certificate and obtaining a new one including the additional stock. At his request she signed the blank transfer and delivered the certificate to him. The broker had no intention of getting the new stock for her; his purpose was to obtain the certificate, and effect a loan upon it for his own use. He presented it to a trust company, representing it to be his stock, and obtained a loan upon it. Plaintiff was held to be estopped by her conduct, notwithstanding the possession of the certificate was obtained by fraud and its conversion amounted to a criminal act. That case and this are quite analogous, for in both the delivery to the agent was obtained through fraudulent representations, and for a very different purpose from that avowed.

In O'Herron v. Gray, 168 Mass., 573, the stock belonged to a minor and was indorsed in blank by her guardian. It was taken from the deposit vault by an officer having access thereto and pledged for a loan. It was stolen and, moreover, the purchaser was clearly chargeable with inquiry into the right of the guardian to transfer.

In Scallons v. Rollins, 173 Mass., 275; 279, the registered bonds, with blank assignment upon them, were left with a broker firm for safe keeping merely. One of the firm took the bonds from the safe and sold them to a purchaser, who relied on the blank transfer. It was held that the title did not pass. Referring to the transfers executed in blank, the court said: "Where they do not purport in terms to confer ownership upon bearer, the most which can be predicated of them, in the absence of evidence of custom or usage, is that they are made in aid of the true title, and not to defeat it, and that they are to be used only to help the true owner in procuring

for himself the rights of which the documents indorsed are the evidence." There was no proof of a usage that would rebut the presumption stated, as there has been in this case. On a second trial of the case proof of such usage was made. The majority of the court held, however, that there was no evidence of any delivery of the bonds to the broker. They were sealed in an envelope, and the envelope intrusted to them for safe keeping. This was not intrusting the bonds themselves; the court saying: "The modern decisions have followed the ancient suggestion that in such case there is no delivery of the contents of the inclosure." In view of the fact that the certificates, themselves, were actually delivered to the wrongdoer in this case, and of the proof of usage in respect of certificates indorsed in blank, the following additional extract from that opinion is pertinent: "A blank indorsement of such an instrument signifies that some person is expected to have the right to fill in the blank. On its face it does not indicate who that person is. By itself it is ambiguous. If, however, the general understanding of all concerned gives it a certain meaning, then it has that meaning by the same convention that gives a certain meaning to spoken or written words. The combination of words and blank is a sign as truly as a completed sentence—a sign which conveys an idea as definitely as if the word bearer had been written in. The extent to which the owner shall be estopped by permitting the sign to remain upon the instrument in that form may be enlarged or limited by considerations of policy more or less articulate. No doubt, if such an instrument were stolen from the owner and indorser, before his indorsement had become effective by a transfer or before the instrument had been put into other hands, even a bona fide purchaser would not get a title, and a different rule would be applied from that which is established in the interest of the currency with regard to bank notes used as money,
19 and which might be extended to other bills and notes which are negotiable in the true sense. Citing Knox v. Eden Musee Co. and other cases. * * * But if the owner of the instrument intrusts it to another, he does so charged with notice of the power to deceive which he is putting into that other's hands, and if deception follows he must bear the burden. (Citing McNeill v. Bank and other cases.) In this case, as in some others, it can not be said that the owner is free from all obligation to contemplate the possibility of wrong doing by a third person." Scallons v. Rollins, 179 Mass., 346, 352. The extent to which this doctrine has been carried by a later decision of the same court has been noted heretofore. Russell v. American Bell Telephone Co., 180 Mass., 467, 469.

In Board of Education v. Sinton, 41 Ohio St., 504, the Board of Education for a certain school district were authorized to issue $20,000 of bonds and no more. September 1, 1869, they issued two hundred bonds of $100 each, payable September 1, 1879 to bearer. Their payment in advance of maturity was contemplated out of taxes levied for the purpose from year to year. Thirty of these bonds were redeemed before June 1875 by the treasurer on

whose report the board ordered them to be cancelled by defacing the signatures. The treasurer was one of the board, consisting of three members, and signed the bonds with the other two. He failed to cancel the bonds and subsequently took them to Sinton and deposited them with him as collateral security for money borrowed. Sinton had no previous acquaintance with the treasurer and made no inquiry as to the custody, or title to the bonds. The court denied his recovery, holding: 1. That the board had exhausted its power and was not vested with authority to reissue bonds redeemed before maturity, as a private person or corporation would be. 2. There could be no estoppel by the act of public officers; but assuming that there could be, there was no act of gross negligence by the remaining members of the board in leaving the matter of cancellation to the treasurer. 3. Sinton was not an innocent purchaser, as the bonds bore the signature of the treasurer who might, therefore, well have had possession without any right of disposition. Under these circumstances it was the duty of Sinton to make inquiry. The distinction between that case and this is apparent.

The last case relied on by the appellant in support of his contention is that of Farmers' Bank v. Diebold Safe & Lock Co., 66 Ohio St., 367. Tyler was secretary and treasurer of the Diebold Company and owned a certificate for certain shares of stock in the same. Being indebted to the corporation he signed a blank transfer of the certificate and delivered it to the president thereof as collateral security. The president put it in an envelope and laid it away in a drawer of the safe used by the president for keeping papers of the corporation, over which he had personal control. Tyler had access to the safe where other papers of the corporation were kept also. At the same time, the stub of the stock certificate book was marked: "Left with the Company as collateral security," and dated August 20, 1889. June 1, 1891, Tyler not having paid his debt the certificate was to be transferred to the president, Clark. The certificate could not be found in the safe and a new certificate was issued to Tyler who immediately assigned it to Clark. An entry was made on the certificate stub as follows: "Certificate lost and duplicate issued under 140, June 1, 1891." Clark did not have the new certificate transferred on the books of the company until June 23, 1892, at which time he surrendered it and obtained a new one in his own name. It was found as a matter of fact that the old certificate had been lost or mislaid without any negligence on the part of Clark, the president. Some time thereafter Tyler found the old certificate in the envelope under some other papers in the safe, and on April 29, 1895, deposited it with the bank as collateral security for a loan of $2,500. Neither the Diebold Company nor Clark had any interest in this loan, or knowledge of the same. Tyler was not acting as their agent but for himself alone. The court held that the plaintiff could not recover against the Diebold Company. It said that the taking of the certificate by Tyler was, "in fact, a criminal act, perpetrated for private gain and not connected with any official authority real or apparent;" that "Tyler's access to the

drawer where the certificate had been placed by Clark, and opportunity to possess himself of any of its contents was not, therefore, by reason of any authority." As to the question of estoppel it was further said that there was no negligence on the part of the corporation or of Clark to warrant it. The facts of the case make it analogous to that of Scallons v. Rollins that has been heretofore reviewed. It is different from the case in hand because here the employee of the corporation did not secretly take the paper from the safe of the corporation, but received it from the hands of the custodian, by means of a false statement of his object.

Whilst not to be understood as intimating that a corporation or any other person is liable in all cases for the default of an agent or servant whose previous conduct has been such as to warrant the confidence reposed in him, we are of the opinion, in the absence of controlling authority to the contrary, that where the servant has been intrusted, as in this case, with a paper so indorsed as to enable him readily, and without exciting suspicion, to impose upon others as the true owner, notwithstanding the fraudulent representations through which he may have obtained that possession, the loss, as between two innocent persons, ought to fall upon the one whose act was the proximate cause of the loss. We see no reason why that principle should not apply in favor of the innocent purchaser in this case.

Upon the conclusion that the transaction passed the title to the shares to the innocent purchaser, it remains to inquire whether the equally innocent negotiator of the sale is nevertheless liable as the agent of the wrongdoer. The contention is that: "The protecting innocence of a bona fide holder can not be extended to the agent of the wrongdoer." The following decisions are cited in support of this contention. Hoffman v. Carow, 22 Wend., 285, 292; Koch v. Branch, 44 Mo., 542, 546; Coles v. Clark, 3 Cush., 399; Bersich v. Marye, 9 Nev., 312, 316; Kearney v. Clutton, 101 Mich., 106; Swim v. Wilson, 90 Cal., 126, 128; Kimball v. Billings, 55 Me., 147, 151.

In all of those cases, save one, the facts are such as to show that the purchaser took no title by the purchase. In Hoffman v. Carow, the earliest of the cases, an auctioneer who sold stolen goods for the thief, was held liable for their conversion; but it was said in the opinion of the chancellor, upon which the court of errors acted, that if the goods had been acquired by fraud and not theft or felony, the title of the purchaser would be good. In Koch v. Branch, a stolen voucher, without any element of negotiability, was collected by an innocent agent and the proceeds remitted to his principal. In Coles v. Clark, a mortgage upon the goods had been recorded, but the goods remained in the possession of the mortgagor, who had them sold at auction. The auctioneer, though not in fact aware of the mortgage, was held liable. In Bersich v. Marye, the innocent broker who sold stock for the thief was held liable. It does not appear that it had been transferred on the back. In Kearney v. Clutton, goods had been wrongfully seized and sold at auction. The auctioneer was held liable for conversion. In Swim v. Wilson, indorsed stock had been stolen and sold by a broker for the thief,

who believed him to be the owner. It was said: "It is clear that the defendant's principal did not, by stealing plaintiff's property, acquire any legal right to sell it, and it is equally clear that the defendant, acting for him, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property."

It will be observed that in no one of those cases would the purchaser have been exempt from liability had he been joined in the action for conversion. They are all founded in the settled rule of public policy that no title to chattels can be acquired through theft or wrongful taking. Hence, all persons, from the first to the last, who take an active or material part in dealing with the goods are held liable for the goods or their value. Innocence of agent or purchaser is no protection to either. If it were otherwise, theft and wrongful taking of property would be encouraged. The exceptional case mentioned is that of Kimball v. Billings, 55 Me., 147, 151. In that case bonds payable to bearer, and presumably negotiable instruments, were stolen. An innocent agent who sold them for the thief was held liable for conversion. Under such conditions the innocent purchaser took an indefeasible title. The only decision cited in support of the position of the court is that of Coles v. Clark, supra, which, as we have seen, is founded on a wholly different state of facts. In another case in which the facts are similar the Supreme Judicial Court of Massachusetts reached a different conclusion. Spooner v. Holmes, 102 Mass., 503, 507.

The same rule of exemption of the innocent agent has been employed in Maryland in a case where one having purchased goods, with the intention to defraud the vendor, had them sold at auction and received the money from the auctioneer, who had no knowledge of the fraud. The vendor had parted with his title through fraud practiced upon him, and was entitled to rescind the sale. Higgins v. Lodge, 68 Md., 229, 236. Under that sale the title would, of course, pass to an innocent purchaser.

If the innocent purchaser, under the special circumstances of this case, would be protected in the title acquired from the agent, we perceive no good reason why the equally innocent agent who, in good faith and in the ordinary exercise of his business, effected the sale, should not be protected also. The fraudulent holder of the paper produced the same indorsed in such manner as to raise the usual and reasonable presumption of actual ownership. The broker, in good faith, acted upon the presumption and procured a purchaser who, acting upon the same presumption, purchased and paid for it. If the purchaser is to be exempted from liability, then it seems reasonable and just that the broker should be also.

For the reasons given the judgment will be affirmed with costs.

Affirmed.

21 TUESDAY, *February 2d, A. D.* 1909.

No. 1921. January Term, 1909.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Appellant,

vs.

WILLIAM B. HIBBS.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

February 2, 1909.

22 THURSDAY, *May 12th, A. D.* 1910.

No. 1921.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY, of the District of Columbia, Appellant,

vs.

WILLIAM B. HIBBS.

On motion of Mr. C. L. Frailey, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between National Safe Deposit Savings and Trust Company of the District of Columbia, appellant, and William B. Hibbs, appellee, a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do comamnd you, if judgment be therein given, that then under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of May, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by
—— ——.

24 (*Bond on Writ of Error.*)

Know all men by these presents, That we, National Savings and Trust Company, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto William B. Hibbs, as surety, in the full and just sum of Three hundred dollars ($300.00) to be paid to the said William B. Hibbs, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents. Sealed with our seals and dated this nineteenth (19th) day of May, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between National Safe Deposit Savings and Trust Company, and William B. Hibbs, the said "National Safe Deposit, Savings and Trust Company" being now "National Savings and Trust Company," a judgment was rendered against the said National Safe Deposit, Savings and Trust Company, (now National Savings and Trust Company) and the said National Safe Deposit, Savings and Trust Company (now National Savings and Trust Company) having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William B. Hibbs citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said National Safe Deposit, Savings and Trust Company, (now National Savings and Trust Company) shall prosecute said writ of error to effect, and answer all costs if it shall fail to make its said

plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of——

NATIONAL SAVINGS AND TRUST COMPANY, [SEAL.]
By WM. D. HOOVER, *President.*

Attest:

CHARLES E. NYMAN.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By CHAS. R. MILLER, *Vice-President.* [SEAL.]

Attest:

THOS. L. BERRY,
Ass't Secretary.

[Seal of Fidelity & Deposit Company of Maryland.]

Bond satisfactory.
J. J. DARLINGTON,
Att'y for Def't in Error.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1921. National Safe Deposit, Savings and Trust Company of the District of Columbia, Appellant, vs. William B. Hibbs. Bond for costs on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 24, 1910. Henry W. Hodges, Clerk.

25 UNITED STATES OF AMERICA, *ss:*

To William B. Hibbs, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein National Safe Deposit, Savings and Trust Company, of the District of Columbia, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court

of Appeals of the District of Columbia, this 24th day of May, in the year of our Lord one thousand nine hundred and ten.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted May 24, 1910.

J. J. DARLINGTON,
Counsel for William B. Hibbs.
S.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 24, 1910. Henry W. Hodges, Clerk.

26 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 25 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of National Safe Deposit, Savings and Trust Company, of the District of Columbia, Appellant, vs. William B. Hibbs, No. 1921, April Term, 1910, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 24th day of May, A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,228. District of Columbia Court of Appeals. Term No. 79. National Safe Deposit, Savings and Trust Company of the District of Columbia, plaintiff in error, vs. William B. Hibbs. Filed June 17th, 1910. File No. 22,228.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 79.

NATIONAL SAFE DEPOSIT, SAVINGS & TRUST COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM B. HIBBS.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES L. FRAILEY,
Attorney for Plaintiff in Error.

A. S. WORTHINGTON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

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vs.

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BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The case comes to this court on writ of error to the Court of Appeals of the District of Columbia, to review its affirmance of a judgment of the Supreme Court of the District of Columbia in favor of the defendant below.

Plaintiff, August 1, 1904, brought an action of trover to recover damages for the conversion by defendant of two certificates representing thirty shares of the capital stock of the Mergenthaler Linotype Company.

The declaration contained two counts; the first referred to a certificate for twenty, and the second to one for ten shares of the stock. Issue was joined and the case tried on an agreed statement of facts (Record, p. 4).

The plaintiff, at the close of the trial, moved the court to find as matter of law upon the facts stated, that it was entitled to a judgment for the sum of $5,205, with interest from June 1, 1904, the market value of the stock at the time of its alleged conversion. The motion was overruled and the plaintiff excepted. Thereupon the court found for the defendant, to which the plaintiff excepted, and judgment was rendered accordingly (Rec., p. 8).

The facts as agreed to are these:

Willard H. Myers had been continuously in plaintiff's employ from 1882 to May, 1904. For the last ten years of his employment he had been, and at the time of the circumstances about to be narrated he still was, a general bookkeeper and assistant note teller of plaintiff, which was a safe-deposit company doing a general banking business, including making loans secured by stocks and bonds as collateral. Myers was a trusted employee, and up to May 26, 1904, had committed no act of malversation. A part of his regular duties was to act as note teller in the absence of that officer, and as such to receive from one of the officials of the company collateral securities deposited by plaintiff's customers, for the purpose of delivering the same to the customer when the loan was paid. Myers had no authority, nor was it any part of his employment or duty, to sell or otherwise dispose of securities or collateral pledged with the plaintiff, or to dispose of stocks, bonds, or other property of the plaintiff or its customers.

On March 12, 1903, one Kelly borrowed from the company $12,500, giving his promissory note therefor and securing its payment by pledging certificates representing one hundred shares of the capital stock of the Mergenthaler Linotype Company. Among these were one for twenty shares, numbered 1105, and one for ten shares, numbered 669, which, with the others referred to, stood in the name of Kelly, whose signature, duly attested, appeared to the usual blank power of attorney for transfer endorsed on each certificate. There was also the recital on each that it was trans-

ferable by him in whose name it stood, in person or by attorney, only upon the books of the company.

For many years, and from a period antedating the time of the occurrences in question, possession of stock certificates signed in blank and attested was, by the custom of banks, brokers, and others dealing in stocks, of which custom the plaintiff was cognizant, recognized and accepted, in the absence of knowledge or cause of suspicion to the contrary, as *evidence* of ownership or authority to sell, pledge, or otherwise deal therewith as an owner might (Rec., pp. 6, 10).

May 26, 1904, Myers requested the plaintiff's secretary to get from the company's vault, where its collateral securities were kept, the certificates for one hundred shares of Mergenthaler stock pledged by Kelly. This request was in accordance with the ordinary course of business of the note teller or one acting as such, it being part of Myers' duties at that time to thus procure collateral, deliver it to a customer paying his loan, receive the money so paid, and enter the payment upon plaintiff's cash book (Rec., pp. 5, 9). The secretary, Nyman, complying with the request of Myers, and following the usual course of business just outlined, handed Myers the stock, including the two certificates numbered 1105 and 669.

Kelly was not in plaintiff's bank at the time the stock was handed to Myers, did not request its delivery to him, and had not paid or offered to pay the note. No entry was made by Myers in plaintiff's cash book, and Kelly did nothing to cause an entry to be made (Rec., pp. 6, 11).

On the following day Myers took the two certificates above described to defendant, a stock broker, with offices on F street, in the city of Washington, and delivered them to one Cox, defendant's cashier, to sell for him, writing his name, at the request of Cox, as a witness to the signatures on the blank powers of attorney thereon. Defendant on the same day, through another broker, sold the stock for Myers on the Washington Stock Exchange at the market price, and thereupon paid to him by check of W. B. Hibbs & Company (defendant's firm name) the proceeds, amounting to $5,205.

When Myers brought the stock to defendant's office to be sold, he said nothing to indicate that it was not his; and neither defendant nor his cashier suspected or had any reason to suspect that Myers was not the owner thereof. Myers in no way intimated or suggested that he was selling the stock, or otherwise acting for or in behalf of the plaintiff; he was, in fact, selling the same *without the knowledge or consent of the plaintiff* or of Kelly (Rec., pp. 7, 11).

It was upon the foregoing facts, set out in greater detail in the agreed statement, that the plaintiff demanded judgment in his favor, with the result above stated.

Assignment of Errors.

The Court of Appeals of the District of Columbia erred:

1. In affirming the action of the Supreme Court of the District of Columbia in overruling the motion of the plaintiff to declare and find as matter of law, upon the agreed statement of facts in the case, that the plaintiff was entitled to a judgment against the defendant for the sum of $5,205, with interest from the first day of June, 1904.

2. In affirming the action of the Supreme Court of the District of Columbia in refusing to enter judgment for the plaintiff for the sum of $5,205, with interest from the first day of June, 1904.

3. In affirming the action of the Supreme Court of the District of Columbia in finding the issues joined between the parties in this case in favor of the defendant.

4. In affirming the action of the Supreme Court of the District of Columbia in entering a judgment in favor of the defendant.

5. In holding that there was negligence on the part of the plaintiff in error in handing to Myers the certificates of stock described in the agreed statement of facts under the circumstances therein detailed, and that the plaintiff in error was estopped thereby from recovering from defendant in error in this action.

6. In holding that under the circumstances of the case as set forth in the agreed statements of facts a *bona fide* purchaser for value would have a good title to the certificates of Mergenthaler stock therein described, and that therefore the defendant in error, as the agent of Myers, was not liable to the plaintiff in error for their conversion.

ARGUMENT.

Before discussing the principal questions which seem to be involved, or which counsel for defendant in error will probably claim are involved in this case, it may not be inappropriate to advert preliminarily to two or three principles of law applicable to the facts agreed, in order to obviate further allusion to them in the argument. These principles appear to be well settled by this and other courts.

(1.) Certificates of stock, such as are concerned in this controversy, are not negotiable instruments, and do not fall within the purview of the negotiable instrument laws, even when endorsed in blank by the owner.

Hammond *vs.* Hastings, 134 U. S., 401, 404.
Dewing *vs.* Perdicaris, 96 U. S., 196.
O'Herron *vs.* Grey, 168 Mass., 573.
East Birmingham Land Co. *vs.* Dennis, 85 Ala., 565.
Knox *vs.* Eden Musee Co., 148 N. Y., 441; 31 L. R. A., 779.
Church *vs.* Citizens St. Ry. Co., 78 Fed. R., 526.
American Press Ass'n *vs.* Brantingham, 75 App. Div., 435 (N. Y.)
Code of Laws, Dist. of Col., sec. 1305.

And even where an instrument otherwise not negotiable has been made so by statute upon endorsement and delivery, all the incidents of endorsement and delivery of bills and notes before maturity do not necessarily ensue from the nego-

tiation of the instruments made the subject of such statute.
Shaw *vs.* R. R. Co., 101 U. S., 557, 563, 564.

(2.) No custom or usage can alter or affect a well-settled principle of law. Therefore no custom or usage of brokers tending to regard certificates of stock endorsed in blank as negotiable securities makes them such, or alters the principles of law applicable to them as non-negotiable instruments.

Thompson *vs.* Riggs, 5 Wall., 663, 680.
Barnard *vs.* Kellogg, 10 Wall., 383, 391.
East Birmingham Land Co. *vs.* Dennis, 85 Ala., 565, *supra.*
Barstow *vs* Mining Co., 64 Cal., 388.
Schumacher *vs.* Copper Co., 117 Minn., 124.

Reference is made to this doctrine because of mention in the statement of facts (Rec., p. 10) of the custom of banks and brokers to recognize and accept possession of certificates of stock endorsed in blank and attested, as *evidence* of ownership or authority to sell or pledge. While this custom falls far short of recognition of negotiability, it has been relied on by opposing counsel to stretch the legal character of stock certificates far in that direction. Further allusion thereto will be made in connection with the custom in Massachusetts referred to in the cases from that State.

(3.) A pledgee of certificates of stock has sufficient title to maintain an action for damages for their conversion.

Smith *vs.* Maberry, 61 Ark., 515, 520.
Treadwell *vs* Davis, 34 Cal., 601, 606.
U. S. Express Co. *vs.* Meintz, 72 Ill., 293.
Adams *vs.* O'Connor, 100 Mass., 515, 517.

From these well-settled rules we pass to a discussion of the questions of law upon which the plaintiff in error relies for a reversal of the judgment in this case.

THE DEFENDANT IN ERROR WAS GUILTY OF THE CONVERSION OF THE STOCK IN CONTROVERSY AND IS LIABLE IN DAMAGES TO THE PLAINTIFF IN ERROR BECAUSE

(1) AS AGENT OF MYERS, WHO PURLOINED THE STOCK, HE SOLD THE SAME, ALTHOUGH INNOCENT OF WRONG-DOING.

(2) THERE WAS NO NEGLIGENCE ON THE PART OF THE PLAINTIFF IN ERROR OR ANY ACT ON ITS PART TENDING TO RAISE AN ESTOPPEL BY WHICH THE DEFENDANT IN ERROR MIGHT BE RELIEVED OF RESPONSIBILITY.

(3) EVEN IF THE CIRCUMSTANCES UNDER WHICH MYERS RECEIVED THE STOCK FROM THE OFFICER OF THE COMPANY, AS SET OUT IN THE AGREED STATEMENT OF FACTS, WERE SUCH AS TO VEST A GOOD TITLE THERETO IN A BONA FIDE PURCHASER THEREOF, WHICH IS DENIED, THE DEFENDANT IN ERROR IS NONE THE LESS LIABLE TO THE PLAINTIFF IN ERROR FOR THE CONVERSION OF THE STOCK, INASMUCH AS HE WAS THE AGENT, ALTHOUGH INNOCENT OF ANY WRONG INTENT OF MYERS IN THE SELLING OF THE STOCK.

I.

The defendant, being the agent of Myers for the sale of the stock in controversy, is liable in damages for its conversion.

The authorities are unanimous in holding that where personal property has been stolen from the rightful owner thereof and the thief disposes of the same through a third person, as, in case of stock, through a broker, such third person is responsible for the conversion of the property, because he could not do as agent for the wrong-doer that which it was unlawful for the wrong-doer himself to do; and it is immaterial that, as in this case, the agent was a broker and in good faith believed that his client was the owner of the property sold.

In Koch *vs.* Branch, 44 Mo., 542, a commissary's voucher was stolen and sold by an innocent third party for the thief. The court decided that the agent was liable in trover to the true owner for the value of the property sold.

Where certain goods were purloined and sent to auctioneers in Baltimore, who sold them without knowledge that their principal was not the lawful owner, it was held that the auctioneers were liable for conversion. The court in this case distinguishes the English decisions and comments upon them.

Hoffman *vs.* Carow, 22 Wend., 285-290 *et seq.*

In the following case the plaintiff was the owner of 100 shares of mining stock, the certificates representing them being endorsed in blank by the person to whom it was issued. This stock was stolen from the plaintiff by an employé in his office, who took the certificate to a stock broker for sale. The employé represented himself as the owner of it, and the broker, relying upon his representation of ownership and in ignorance of the theft, sold the stock in the usual course of business and paid over to the thief the proceeds of the sale. In an action against him for conversion the court held that he was liable, saying:

> "It is clear that the defendant's principal did not by stealing plaintiff's property acquire any legal right to sell it, and it is equally clear that the defendant, acting for him and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property."
>
> Swim *vs.* Wilson, 90 Cal., 126; 13 L. R. A., 605–607.

A certificate of stock was stolen and brought by the party who purloined it to a broker, who, innocent of the manner in which the stock had been acquired, sold the same, relying upon the representation of ownership by the thief. In an

action for the value of the stock the broker was held liable, and the court said:

> "It is next objected that, as the defendant was the innocent agent of the person from whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous."
>
> Bercich *vs.* Marye, 9 Nev., 312, 316.

In the following case, which is cited with approval and as an authority by the two cases next preceding, government bonds, payable to bearer, were stolen and brought to a broker for sale. The broker, without knowledge of the theft and assuming his customer was the true owner of the bonds, sold them for him. It was held that the broker, being the agent for the thief, although innocent of any wrong-doing on his part, was nevertheless liable to the plaintiff for the value of the bonds. The court in its opinion said:

> "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner and is ignorant of such person's want of title."
>
> Kimball *vs.* Billings, 55 Maine, 147, 151.

See also —

Coles *vs.* Clark *et al.*, 3 Cush. (57 Mass.), 399.
Kearney *vs.* Clutton, 101 Mich., 106.
Fort *vs.* Wells, 14 Ind. App., 531.

As we shall hereafter show, Myers was guilty of the theft of the certificates of stock which are the subject of this controversy, and it is clear, therefore, from the authorities just cited, that defendant in error, as agent for Myers in selling the stock by him wrongfully acquired, and to which he had

no title, was guilty of the conversion thereof, and therefore is liable to plaintiff in error, unless some further principle of law arising upon the facts agreed intervenes to defeat plaintiff's right to recover.

The Court of Appeals applied the doctrine of estoppel to the circumstances under which Myers obtained the certificates in controversy and was enabled thereafter to dispose of them, holding the plaintiff in error guilty of such negligence as to preclude recovery in this action. To this question the following argument is now addressed.

II.

There was no negligence on the part of the plaintiff in error, and there are no circumstances in the case tending to show want of care on its part upon which estoppel can be predicated. The wrongful and criminal act of Myers was the proximate cause of the conversion of the certificates of stock by the defendant in error.

The cases touching upon the validity of the title of a *bona fide* purchaser for value of certificates of stock, or other non-negotiable commercial instruments, as against the owner thereof, where they have passed through the hands of one having no right to transmit them to such purchaser, may be divided into two classes:

(1) Cases where the owner of the document *voluntarily entrusts* it to the possession of *another* in such form as to clothe the latter with the *indicia* of ownership, and that person converts it to his own use.

In this class the *voluntary intrusting of possession to another* of the instrument, thereby enabling the latter to deal with it as his own so far as *his relations with the public* are concerned, is held to be negligence, and is the controlling fact upon which an estoppel is predicated.

(2) Cases in which an employee, servant or stranger had access to a document remaining in the possession of the owner, and took it out of such possession without the knowledge or consent of the latter, and converted it to his own use.

In this class, although the owner may have put sufficient confidence in the agent or servant to give him access to the instrument, and thus furnished an opportunity for theft, it is held that no negligence exists and no estoppel ensues.

The question therefore arises, to which of these classes does the case at bar belong, or to which is it most analogous?

The Court of Appeals answered the question thus:

> "This is not the plain case of certificates entrusted to an agent or creditor as security for a particular purpose, and fraudulently disposed of by him for another, under the general power enabling him so to do, so as to bring it directly within the principle illustrated by the case of *McNeil vs. Bank, supra*, and other cases cited. Nor, on the other hand, is it a plain case of theft, without negligence of the owner and custodian, so as to bring it directly within the principle of *East Birmingham Land Co. vs. Dennis, supra*, and cases cited therewith. On the whole, however, giving due allowance to the character and values of the paper, and the general usage of the business in relation thereto, in which the trust company was engaged, also, we are of the opinion that the analogy in this case is with the former, rather than the latter" (Rec., p. 18).

It is our province now to examine the leading authorities representing both classes, many of which are cited in the opinion below; and after such examination, we shall argue that the Court of Appeals erred in placing the case at bar within the category of the first class, and that the facts in the record before the court bring it within the principles of the second class.

1. Cases Applying the Doctrine of Estoppel.

McNeil vs. Tenth National Bank, 46 N. Y., 325:

The owner of a certificate of stock brought an action to compel the pledgee thereof to surrender it to the plaintiff as such owner. The latter had endorsed the certificate in blank and delivered it to his brokers as security for a loan. They wrongfully hypothecated the stock to the defendant bank, which received it in ignorance of the fraud.

In the lower courts plaintiff recovered, and on appeal the Court of Appeals was evenly divided, and ordered a reargument. After the second hearing the judgment in favor of the plaintiff was reversed, the court, in its opinion (Rapallo, J.), saying:

> "The assignment and power (of attorney) * * * as well as the certificate, were voluntarily intrusted by the plaintiff to the brokers, and the latter were thus invested with the apparent ownership and right of disposal, not merely by the negligence of the true owner, but by his voluntary act, and for the *very purpose* of attesting to the world their title and power, in case the contingency should arise in which according to the understanding between them and the plaintiff, they would be justified in resorting to the stock for their own indemnity" (p. 337).

Here, it will be seen, the plaintiff voluntarily parted with the possession of the certificate, which he entrusted to the broker. Up to the moment the latter hypothecated it he had the unquestionable right to its possession wherever he might choose to be. Without first committing fraud upon the owner of the certificate, or perpetrating any crime, he had the *opportunity* of exhibiting it as his and disposing of it.

Pennsylvania Railroad's Appeal, 86 Pa. St., 80, 83:

Here the owner of certificates of stock intrusted them, signed in blank, to his attorney, who converted them to his own use. The attorney was, of course, neither employee nor

servant. The owner voluntarily parted with the possession of the certificates, thus conferring upon the attorney the power to deceive innocent parties. This was held negligence on the part of the owner sufficient to defeat his right to the stock. Sharswood, J., however, says:

> "* * * there is no doubt, we think also, that, had the certificates of stock, which are the subject of the controversy, been lost or stolen *from the possession*" (italics ours) "of the appellees, the appellants would have been responsible."

Burton's Appeal, 93 Pa. St., 214, 218:

In this case the owner *intrusted* his certificate of stock, endorsed in blank, with a broker to sell. The latter wrongfully pledged it for a debt of his own. The court refused to deny the title of an innocent purchaser, but considered the certificate non-negotiable, or at best *quasi* negotiable. The case was affirmed substantially on the opinion below, which proceeds in part:

> "It is not pretended here, that the plaintiff by accident or misfortune, parted with or lost his certificate; the fact is admitted that in no such way did he suffer any injury; had it been otherwise, then, indeed, the vigorous language of *Gibson,* C. J., in Biddle *vs.* Bayard (1 Harris, 150) would apply. The rule * * * would compel a man to lock his stable door, for the owner of paper had no more reason to think he was going to lose it than a man has to think his horse is going to be stolen."

Here again possession was voluntarily relinquished to one neither an employee nor a servant.

Moore vs. Bank, 55 N. Y., 41:

The certificate of indebtedness, the subject of this case, was voluntarily delivered by the owner to one to whom it was assigned, from whom it passed to a *bona fide* purchaser. The court invokes the doctrine of the case of McNeil *vs.*

Tenth National Bank, *supra*, holding that "where one *known to be the owner* of shares" delivers to *another* possession, with written transfer of title, he cannot prevail against an innocent transferee.

Holbrook vs. N. J. Zinc Co., 57 N. Y., 616:

This was a suit against the defendant company to recover damages arising from its refusal to transfer on its books certificates of stock. The court follows the principles announced in McNeil *vs.* Tenth National Bank, *supra.* No servant or employee was involved.

Driscoll vs. Mfg. Co., 59 N. Y., 96:

Suit was brought to compel transfer of stock by company to vendee. It had issued to vendor, who was indebted to the company, certificates of stock. There was a by-law of defendant, though not appearing on the certificate, forbidding transfer of the latter while the holder thereof was indebted to the company. The vendor pledged the stock with vendee to secure an indebtedness of his own, and vendee bought in on default. The court held that the company, by issuing the stock to vendor, clothed him with apparent unconditional ownership, and that as vendee's title could not be disturbed the latter was entitled to have the stock transferred to him on the books of the company, notwithstanding the by-laws referred to. Here also possession was voluntarily surrendered.

Cushman vs. Mfg. Co., 76 N. Y., 365:

This was another case in which transfer of stock was sought. A had assigned in blank a certificate and delivered it to plaintiff. Later A executed an assignment of the same certificate to B. The company required that before transfer of stock could be had certificates must be delivered to it. H, an officer of the company, caused the stock in controversy to be transferred to B in accordance with the second assign-

ment and without surrender of the certificate. Plaintiff then surrendered the certificate assigned to her for transfer, which was refused. *Held:* That she had the legal and equitable title to the stock, and was entitled to have it transferred to her.

Cowdrey vs. Vandenburgh, 101 U. S., 573:

The owner of the certificate in question (a certificate of the auditor, Washington Board of Public Works) *intrusted it*, endorsed in blank, by way of pledge, to one Blumenburgh to secure an indebtedness. On the maturing of the loan they sought to pay it, but Blumenburgh had vanished. Cowdrey purchased the certificate and set up that he was a *bona fide* holder, but failed to support such allegation by evidence. Therefore he was held to be in the shoes of Blumenburgh, and the owner's title to be valid, especially as Cowdrey parted with no value.

The court also held that such a certificate was not negotiable, and said that no "weight" could "be given to the suggestion that by custom these instruments are considered and treated as negotiable paper in the District. There was no evidence offered of the existence of any such custom, even had such evidence been admissible to contravene an established rule of law." The court, on the subject of estoppel, however, went on to state:

> "If the pledgee, Blumenburgh, had written over the blank endorsement of the complainants a formal assignment to himself of the claim, and in that form had sold the certificate to Cowdrey for value, it is possible that the latter might have successfully insisted that the complainants were estopped from asserting, as against him, ownership of the claim. The principle is well settled that when the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they shall be protected" (p. 575) citing McNeil *vs.* Tenth National Bank, *supra*.

It will be observed that in the case just referred to, as in the others preceding on this subject, possession of the certificate was voluntarily surrendered by the owner.

Laughlin vs. District of Columbia, 116 U. S., 485:

Here again the owner of a certificate of the auditor for the District Board of Public Works pledged it with the same Blumenburgh, who disappeared. Cowdrey got possession of it and presented it for settlement to a board of audit created by statute after the Board of Public Works had been abolished and the present form of government by Commissioners had been established. Laughlin afterwards filed a suit in the Court of Claims to recover the amount of the certificate. The Board of Audit gave public notice to all creditors of the District prior to beginning its work, but Laughlin did not appear and file his claim. *Held:* He could not recover, as he was bound to take cognizance of the notice just mentioned. The court, on the question of estoppel, remarks:

> "It has been settled in this court that if the owner of certificates of the auditor of the board of public works, like those now in question, places them in the hands *of a third person* (italics ours), indorsed in blank, so as to give him apparent authority for their collection, payment by the District to the person so invested with apparent authority, without notice of a want of actual authority, will discharge the debt" (p. 489).

National Safe Deposit & Trust Co. vs. Gray, 12 App. D. C., 276:

In this case the owner of a certificate of stock pledged it with another to secure a debt, thus voluntarily relinquishing possession thereof "to a third person." The pledgee wrongfully repledged it with the trust company to secure a loan which he had obtained from that company. The owner of the stock filed a bill to redeem it on payment of the amount due the trust company from the first pledgee. The trust

company claimed to hold it absolutely as security for antecedent debts under a contract with the latter. The Court of Appeals held, affirming the court below, that the owner could redeem as prayed by him, on the ground that, from the evidence, the trust company, by believing that first pledgee owned the stock, was prejudiced only to the extent of the loan made thereon. In the opinion *McNeil vs. Tenth National Bank*, as approved in *Cowdrey vs. Vandenburgh, supra*, is followed.

Strong vs. District of Columbia, 4 Mackey, 242, 252:

Here was involved, likewise, the wrongful conversion of certificates of stock by one with whom the owner had pledged them as collateral security. The owner had, of course, voluntarily surrendered possession of the endorsed certificates to the pledgee.

Scollans vs. Rollins, 179 Mass., 346, *et seq:*

This case was first before the Supreme Judicial Court in 173 Mass., 275. Non-negotiable certificates of indebtedness of the city of Boston, endorsed in blank, were delivered by owner to his broker for safe-keeping. The broker wrongfully pledged them, and pledgee finally sold them to defendant. The court first held that plaintiff's title was not divested by negligence, in the absence of a custom or usage among those dealing in such certificates to pass title by delivery thereof, duly assigned in blank. At the second trial this custom, including the further usage that such certificates so endorsed passed from hand to hand without inquiry as to the title of intermediate holders, was duly proven. On appeal the court held owner was estopped, on the ground "that if the owner of the instrument entrusts it to *another* (italics ours), he does so charged with notice of the power to deceive which he is putting in that other's hands, and if loss follows he must bear the burden." But the court further says:

"No doubt, if such an instrument were stolen from the owner and indorser before his indorsement had become effective by a transfer or before the indorsement had been put into other hands, even a *bona fide* purchaser would not get a title, and a different rule would be applied from that which is established in the interest of the currency with regard to bank notes used as money, and which might be extended to other bills and notes which are negotiable in the true sense" (p. 352).

Citing Knox *vs.* Eden Musee American Co., 148 N. Y., 441, hereafter referred to at length.

Russell vs. Telephone Co., 180 Mass., 467:

Plaintiff in this case intrusted the certificates, endorsed in blank, to another person for the purpose of surrender to the telephone company, in order that a new certificate, including additional shares, could be issued to her. This person sought the plaintiff and obtained the certificate for the purpose of converting the stock to his own use, the fraud apparently being a technical larceny under the laws of Massachusetts. It was held plaintiff could not recover. The court regards the existence of technical larceny as immaterial, the ground of the decision seeming to depend upon the act of the plaintiff in *intrusting to the agent the possession* of the certificate indorsed in blank, thereby clothing him with apparent ownership. In that, the element of estoppel existed, and it was of no moment that the *voluntary surrender* of possession was obtained by fraud amounting to technical larceny. But it will be observed that the fraudulent agent did not steal or take the certificates away from the plaintiff without her knowledge or consent—in which case of course the element of estoppel would be lacking, as there would then have been no voluntary act of the plaintiff clothing the agent with power to deceive. This distinction is recognized in the court's opinion, in which Mr. Chief Justice Holmes says:

"The distinction is not new. On the one side are cases like Knox *vs.* Eden Musee Americain Co., 148

> N. Y., 441; where an agent or servant simply had access to a document remaining in the possession of the owner; on the other, cases like Pa. R. R. Company's Appeal, 86 Penna. St., 80, where possession is intrusted to the agent for one purpose and he uses it for another. It cannot matter in the latter class that the agent intended fraud from the outset" (p. 470).

And, referring to the plaintiff in the case, he further says:

> "But *she knew*" (italics ours) "that she was putting into her agent's hands an instrument which made actual deceit possible" (p. 470).

The foregoing are the principal and leading authorities referred to in the first class or division mentioned at the beginning of this branch of the argument.

Coming now to the second class, the following are the leading cases within its purview.

2. Cases in Which the Application of the Doctrine of Estoppel Has Been Denied.

Board of Education vs. Sinton, 41 Ohio St., 504, 513:

In this case school bonds of a certain county in Ohio were taken up by the treasurer of the county, D, who was directed to cancel them. Instead of so doing, D hypothecated the bonds to S to secure the latter for a loan to D. S was innocent of the deception. The county, of course, refused to pay the bonds, and S lost his money. The Supreme Court of Ohio held:

1. That the county was not negligent in failing to see that D carried out its directions and canceled the bonds, and that therefore—

2. No estoppel arose.

3. That the loss of S was not the proximate result of negligence or any omission of duty. The direct and only cause of the loss was the *crime committed;* and in committing it D

did not pretend to act as treasurer, but for himself and his own advantage, and S so trusted him.

Hill vs. Jewett Pub. Co. (Mass.), 13 L. R. A., 193:

The president of a corporation whose duty it was to sign certificates of stock but not to issue them, the signature of the treasurer of the company also being necessary to their validity, forged the name of the treasurer, and they were taken by plaintiff, who sought to compel the company to make good his loss.

Held, that the company was not negligent; that the conduct of the president *could not have been anticipated;* that there was no negligence of the corporation in keeping its seal and stock certificate-book where the president could have access to it, so as to be able to remove the blank certificates therefrom and impress the seal on them. The court say that the defendant—

> "is not to be held responsible for his (the president's) criminal fraud, as for an act made possible by its negligence" (p. 195).

O'Herron vs. Gray, 168 Mass., 573, 577:

Certificates of stock were deposited in a bank for safekeeping by a guardian for certain minors. The stock was endorsed in blank in the name of the minor, "by O., Guardian." An officer of the bank took them and pledged them for his own benefit. One of the questions in the case was whether the guardian was negligent in leaving them in the bank for safekeeping thus endorsed. The court held no negligence existed and that the act of the guardian was not the proximate cause of the defendant's (pledgee's) loss. The court said on this point:

> "The principle" (estoppel by negligence) "which the defendants invoked is not applicable to the facts. Negligence which will work an estoppel of this kind must be a proximate cause of the purchase or ad-

vancement of money by the holder of the property, and must enter into the transaction itself. * * * If the negligence is such as might be an appropriate foundation for an action at law to recover damages by one who advances his money, it may be availed of by way of estoppel to avoid circuity of action.

"But the facts of this case fall short of showing such negligence. The guardian intrusted the certificates to a national bank of good reputation. Neither she nor anybody else had any reason to anticipate the larceny or embezzlement of the property, and a fraudulent use of it to deceive others by a trusted officer of the bank. She had no reason to expect that, if the certificates were stolen anybody would take them without inquiring whether, as trust property, they had been disposed of by the guardian for the benefit of her wards. The conduct of the guardian was not a cause, but a mere condition of the defendant's advance of money upon the faith of the certificates.

"*A criminal act of Francis* (the cashier of the bank) *intervened as the cause of the defendant's loss, and this the guardian had no reason to anticipate*" (p. 500, 40 L. R. A.).

Farmers' Bank vs. Diebold Safe, &c., Co., 66 Ohio St., 367; 58 L. R. A., 620:

The language of the court in this case, quoted hereunder, is extremely pertinent to the case at bar. The facts reported were in substance that between 1882 and 1884, Tyler had become indebted to the company and to secure it he endorsed in blank a certificate of stock, which was then handed to Clark, as president of the company, who placed it in an unsealed envelope in an unlocked drawer in the safe in the office kept jointly by Clark and Tyler, and which was used by them for the purpose of keeping the papers of the corporation; the safe being accessible to both Clark and Tyler. In 1891, Tyler, not having paid up, Clark agreed to buy the certificate and after the arrangements had been made, Clark went to the drawer of the safe to get the certificate,

but did not find it, and upon inquiry nothing was known of its whereabouts. Thereupon a new certificate was issued to Tyler and by him assigned to Clark; Tyler, out of the proceeds of the sale, paying his indebtedness to the company. Clark made no search or inquiry after the old certificate until 1896. In 1891, when the new certificate was issued, there was marked in red ink on the stub of the stock book from which the old certificate had been issued, "Certificate lost and duplicate issued under No. 140, June 1, 1891." One or two years after 1891, Tyler, still secretary of the company, found the lost certificate in an old envelope in the drawer of the safe under other papers where Clark had placed it, and thereupon, without the knowledge or consent of Clark or of the company, he, in 1895, borrowed $2,500 on the certificate, which was accepted as collateral security therefor by the Farmers' Bank. Neither Clark nor the company had any interest or knowledge concerning the transaction. Tyler was not the agent of the company nor of Clark in any way respecting the loan to him by the bank or respecting his possession of the certificate, or of his hypothecation of the same as collateral. In holding that the bank had no title to the stock, the court says:

> "The demand of the plaintiffs in error is, in substance, that the company and Clark be held not to have title in certificate No. 61, and that title in the same be declared to be in them, and for full equitable relief. It is manifest that, if this relief be granted, the claims of the company and of Clark must be denied them on the ground either: (1) On the doctrine of implied agency; or (2) on the application of the principles of estoppel. But Tyler, although secretary and treasurer of the company, was not its agent to represent to one with whom he might be dealing on his own account, and away from its office, the fact as to who owned the stock of the corporation, or in whose name the stock stood on its books. Such representations were no part of his real or apparent authority. The transaction with the bank was one which did not concern his official duty in any respect, but was

wholly for his own personal profit. The company had no actual or apparent connection with it, nor did Tyler pretend to represent or act for the company. Indeed, it was apparent from the face of the certificate that Tyler had exercised his authority as secretary for his own advantage. In other words, the case stands, as to the question of agency, precisely as though the transfer had been made by one who had no relation whatever with the management of the company: for it is of no materiality that Tyler was the agent of the company for some purposes, so long as *he was not its agent for the purpose of negotiating its certificates of stock as security for his individual debts*, and so long as he did not pretend to have such authority, nor to act for the company in any way" (p. 623, 58 L. R. A.). * * *

And upon the point of negligence particularly the court remarks:

"Nor was there any reason existing for suspecting the integrity of Tyler. He had been an officer of the company, trusted, and apparently deserving trust, since the year 1876. Nothing had occurred during all this time to cause the company or his fellow-officers to doubt his honesty and faithfulness, and, so far as appears, the abstracting and using this surrendered certificate was his first act of malversation during his employment. If the company had had reason to suspect the honesty of Tyler, a different question would be presented. *It is not negligence, but ordinary care and prudence to deal with one who has proved himself worthy of confidence in the belief that he remains honest*, and trust him accordingly, even though it should turn out that he afterwards, yielding to temptation, has betrayed his trust. As remarked by Williams, J., in *Ex parte* Swan, 7 C. B. N. S., 447: 'It is one thing to say that a man shall be answerable for such immediate consequences of his acts as a reasonable man might well foresee and dread, and would therefore shun. But it is another and very different proposition to maintain that a man shall forfeit his property because he has done an act which will not be perilous unless others also are guilty of misconduct

which that act does not cause.' The injury to the bank and to McDowell was not the natural consequence of the leaving of the certificate in the president's drawer, or one which might have been reasonably anticipated. The rule, and we believe, the true rule, is stated by Blackburn, J., in Swan *vs.* North British Australasian Co., 2 Hurlst. & C., 182, thus: 'The neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake, and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy.'" (Italics ours.) (P. 624, 58 L. R. A.)

Hall vs. Wagner, 111 App. Div. (N. Y.), 70, 75, 76:

A woman who owned stock caused the certificates to be issued in the name of her brokers with whom she deposited them as collateral security. Desiring to redeem them, she sent a messenger for the certificates with a check in payment of her indebtedness. The brokers gave them duly endorsed, to the messenger, who hypothecated them with another firm for a debt of his own. This firm ultimately acquired the stock in payment of the messenger's debt. The original owner having died, her executor brought suit against the latter firm and recovered a judgment against them, which was affirmed (1906) by the appellate division, first department.

The plaintiff relied on *Knox vs. Eden Musee Co.,* 148 N. Y., 441 (hereafter referred to at length), and the defendants on McNeil *vs.* Tenth National Bank, 46 N. Y., 325, *supra.*

The court, after consideration of both cases, applied and followed the former, and said:

"To establish this estoppel it must appear that the true owner had conferred upon the person who has diverted the security the indicia of ownership, or an apparent title or authority to transfer the title. The reasoning in all the cases negatives the extension of the principle to a case where a stock certificate such as the one in question has been stolen or fraudulently obtained from the true owner; for there the owner of the stock had by no voluntary act conferred upon the third party the indicia of ownership, apparent title or right to transfer the stock, and so I assume that if the owner of a certificate of stock, with a valid transfer executed by the person in whose name the stock stood, should give it to a messenger to be carried to a bank for safekeeping, and that messenger on the way should divert the stock and transfer it to a *bona fide* purchaser for value, such a transfer would not estop the owner from asserting title, for the reason that the owner had never conferred upon such a messenger an apparent title or the indicia of ownership. * * * and unless it is intended to confer upon certificates of stock the attributes of negotiable instruments, which the courts of this State have uniformly refused to do, the claim that the defendants here acquired, as against the plaintiff's testatrix, or as against her estate, any title to this stock, cannot be sustained."

Shaw vs. Railroad Co., 101 U. S., 557, 563, 564:

In this case an original bill of lading was endorsed in blank by the firm of Norvell & Co., to which it was issued, and in that condition was by that firm delivered to a bank as collateral security for a draft on M. Kuhn & Brother which Norvell & Co. sold to the bank. Norvell & Co. at the same time sent the duplicate bill of lading to Kuhn & Brother. The draft, with the original bill of lading attached to it, was presented to Kuhn & Brother by a messenger for acceptance by them. The messenger presented the draft and the bill of lading to Kuhn & Brother, and a member of that firm, without being detected by the messenger, in accepting

the draft substituted the duplicate for the original bill of lading. The original bill of lading, of which Kuhn & Brother had thus wrongfully obtained possession, was sold to one who claimed to be a *bona fide* purchaser, and the respective rights of such alleged *bona fide* purchaser and the bank in which it had been deposited as security arose in an action of replevin, and finally reached the Supreme Court of the United States.

There was a question whether the rights of the parties depended upon the law of Missouri or the law of Pennsylvania. The Supreme Court held that made no difference, inasmuch as by statute in each of those States bills of lading were made negotiable by written endorsement thereon and delivery.

Mr. Justice Strong, in delivering the opinion of the court, said:

> "So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a *bona fide* purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability, or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order, or bearer, but its indorsement or delivery does not cut off the defences of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.
>
> "It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation. * * * (P. 563.)
>
> "The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for

transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it,—a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why then should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right" (pp. 564, 565).

Bangor El. L. & P. Co. vs. Robinson, 52 Fed., 520:

Robinson and one Williams, a broker with whom the former had business relations, had in common a safe-deposit box in a trust company in Boston, to which both had access. Robinson deposited therein certificates of stock endorsed in blank by one Laughton, Robinson's vendor. Williams, without Robinson's knowledge or consent, took them from the box and pledged them to a Mrs. Lee. The Bangor company, which had issued the shares, brought interpleader against Robinson and Lee to determine the ownership of the stock. *Held:* (Putnam, J.), That Robinson was entitled to a decree, the court saying, on page 253, "The contest at bar relates to the mere negligence of the original holder, and how far this may prevent him from reclaiming his property. At first it occurred to the court that, inasmuch as Robinson had seen fit to leave this certificate in such condition as to indicate that somebody was authorized to acquire it and fill in

the indorsement, he was barred; but the court is unable to find any authority sustaining this suggestion, and is compelled to treat this certificate, indorsed in blank and stolen, as it would any other stolen property, aside from strictly negotiable securities."

Doran vs. Miller, 124 Ill. App., 551:

In this case a married woman owned stock, and kept the certificates in a safe-deposit box, to which she and her husband both had access. When she placed the certificates in the box, she endorsed them in blank at the suggestion of her husband, who so advised her because in case of her death intestate her affairs could be handled with less confusion than otherwise. Without her knowledge or consent the husband took the certificates from the box and pledged them for value. The court held that she was entitled to the stock and that the doctrine of transfer by estoppel did not apply.

The case was again argued on appeal (Miller *vs.* Doran, 151 Ill. Appeal, 527), where the same ruling was adhered to, the court in its opinion citing with approval Bangor Electric Light and Power Co. *vs.* Robinson, 52 Fed., 520; Farmers' Bank *vs.* Diebold Safe, &c., Co., 66 Ohio St., 367, *supra,* and Knox *vs.* Eden Musée Co., 148 N. Y., 441–457, *infra.*

Knox vs. Eden Musee Americain Co., 31 L. R. A., 779, 783, 785; 148 N. Y., 441:

An action was brought by one Knox to recover damages claimed to have been sustained by reason of the negligence of the defendant, The Eden Musée Americain Company, in not having accomplished the cancellation of certain certificates of stock. These certificates had been surrendered for transfer and a new certificate had been issued therefor. The old certificates were taken without authority from the defendant's safe by one of its employés having access thereto, who induced the plaintiff to loan him money on the faith of the certificates. The plaintiff, when the loan fell due and

was unpaid, and when he undertook to realize upon his collateral, discovered upon inquiry at the defendant's office that the certificates were not valid, but mere vouchers for valid stock which had been issued upon the surrender of the old certificates which he held. The employé referred to was named Jurgens. He had been in the service of the defendant several years and had done nothing to excite suspicion as to his honesty. The defendant trusted him, and the act complained of proved to be his first offense. Among his duties were, when stock was transferred, to cancel the surrendered certificates and paste them in the certificate book, prepare the new certificate and impress the company's seal thereon, and then procure the signature of the president of the company. In every case prior to the one in question the president signed a new certificate, only when Jurgens presented to him, with the new certificate, the surrendered one canceled. There was a departure from that practice in the instance in question. The president of the company in this connection knew when he signed the new certificate that the old certificates had been surrendered and were then in the possession of the company, because he had placed them in the safe himself. The safe was kept in the office of the company, and Jurgens had the key to it, and thereby access to it, and had been by the president directed to cancel the surrendered certificates. On this state of facts the court, after able argument by counsel at the bar, said:

> "We come, therefore, to consider the ground upon which the learned referee placed his judgment against the defendant, viz: The negligence of the company. The claim of liability of the defendant on the ground of negligence is based on the fact that in violation of its by-laws it permitted the surrendered certificates to remain uncanceled in its safe, to which Jurgens had access, and thereby enabled him to commit the fraud, and upon the further allegation that the company neglected to exercise a proper supervision over its business and the conduct of its employees, and committed to Jurgens the management of its affairs without special inquiry into

the manner in which he discharged his duties. We are of opinion that the company was not chargeable with any negligence which gives a right of action for the injury caused to the plaintiff by the fraudulent use by Jurgens of the surrendered certificates. The surrendered certificates were placed by the company in its safe in its office, of which Jurgens had the key, and thereby, it may be said, afforded him the opportunity to commit the crime of which he was guilty, in abstracting and uttering them as valid. But it is not true, as a general rule, that a man may not intrust his property to the custody of his servant, except at the peril of losing his title thereto if the servant steals and disposes of it to another. There must be something more than the mere intrusting to a servant of the custody of a chattel and the consequent opportunity for theft, in order to preclude the master from reclaiming it, if stolen by the servant and sold to another. Rapallo, J., in McNeil *vs.* Tenth National Bank, 46 N. Y., 329. * * * The employment of a servant to whom is intrusted the master's property, with no power of disposition, is not alone such a putting of trust and confidence in the servant by the master as to enable the latter by his wrongful act to defeat the master's title. The rule which would convert the mere employment of a servant into an authority in him, as to third persons, to sell or dispose of his master's goods intrusted to him for safe-keeping, would be highly dangerous and has no sanction in the adjudged cases. * * * The president of the company knew when he signed the new certificate that the old certificates had been surrendered and were then in possession of the company, because he had placed them in the safe, and the fraud of Jurgens was made possible because the president relied upon Jurgens to cancel the surrendered certificates, as he had directed him. It is urged that the improper use made of the certificates might reasonably have been expected to result from leaving them in the safe of the company in his care uncanceled. In other words, the claim is that the company ought to have anticipated that Jurgens might commit the crimes of forgery and larceny, and put the certificates on the market if they were left uncan-

celed under his control. We do not assent to this suggestion. If the company knew that Jurgens was dishonest, or had reason to suspect his honesty, a different question would be presented. But it is not generally an omission of ordinary prudence that an employer deals with his employees on the assumption that those who have hitherto been faithful in the performance of their duties will continue so to be, or because he does not anticipate and provide against the possibility of their criminal acts. Breaches of trust and confidence unfortunately are not infrequent. But honesty is nevertheless, we believe, the general rule of human conduct, and one may indulge in this faith in human nature and trust those who have proved themselves worthy of it without subjecting himself to a charge of negligence, if it should turn out that they afterwards yielded to temptation and used their position to the injury of others. 'It is one thing to say that a man shall be answerable for such immediate consequences of his acts as a reasonable man might well foresee and dread, and would therefore shun. But it is another and very different proposition to maintain that a man shall forfeit his property because he has done an act which will not be perilous unless others are guilty of misconduct which that act does not cause'" (pp. 783, 784, 31 L. R. A.).

And with reference to the question of supervision over the acts of an employee and the lack of it constituting negligence, the court remarks:

"The claim that the injury to the plaintiff was occasioned by the omission of the defendant to exercise proper supervision over the conduct of Jurgens has, we think, no force. There was an interval of about three weeks between the time when the certificates were surrendered to the company and their abstraction and transfer by Jurgens. If during this period the officers of the defendant had examined the contents of the safe, it might have been ascertained that the certificates were uncanceled. An examination after that time would not have benefited the plaintiff, at least there is no evidence that a discovery of the

> fraud after it had been accomplished would have changed his position. The transfers of stock on the books of the company were comparatively infrequent. The president had reason to suppose that Jurgens would obey his directions and cancel the certificates, and the omission to inquire whether he had done so, during the period mentioned, is, as we think, quite insufficient to support the charge of negligence" (p. 785, 31 L. R. A.).

East Birmingham Land Co. vs. Dennis, 85 Ala., 565; 2 L. R. A., 836:

The plaintiff in this case kept a certificate of stock endorsed in blank, in a box in the vault of a bank, whence it was abstracted by some person unknown apparently without any fault on the part of the owner. The certificate came into the hands of a *bona fide* purchaser. It was held the latter had no title.

The court in its opinion says (p. 838, 2 L. R. A.):

> "There is a class of cases, *not to be confounded with the one in hand*, where the holder of such a certificate of stock, indorsed in blank, is clothed with power as agent or trustee *to deal with such stock to a limited extent*, and transfers it by exceeding his powers, or in breach of his trust. In such cases, it has often been held that the true owner, having *conferred on the holder by contract*, all the external indicia of title, and *an apparently unlimited power of disposition* over the stock, 'is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner.'" (Italics ours.)

Citing, among other cases:

McNeil vs. Tenth National Bank, supra.

Schumacher vs. Green Cananea Copper Co., 117 Minn., 124; 134 N. W. Rep., 510; 38 L. R. A (N. S.), 180:

This is, perhaps, the latest case upon the point under discussion, having been decided in February, 1912.

The facts of the case are strikingly similar to the one at bar.

In May, 1909, plaintiff pledged, among others, a certificate of stock of the Copper Company, endorsed in blank, with the First National Bank of Ironwood, Mich., to secure a loan. These certificates were attached to the note evidencing the indebtedness, which described them and authorized the sale thereof by the president or cashier of the bank, on default. The cashier thereafter took the note and certificate from the bank, detached the latter, and left it with many others with a broker for sale. The broker sold it to Miller & Co., New York, drew on that firm for the amount of the purchase price payable to his own order, and endorsed and delivered the draft to the cashier, who sold and forwarded the same, with the certificates attached, to a bank in Duluth, with instructions to credit the amount to the Ironwood Bank. June 21, 1909, the latter bank went into the hands of a receiver. Plaintiff did not discover until July 1 that the pledged certificate had left the possession of the bank. Thereafter plaintiff tendered payment of his note and demanded return of the certificates pledged, but of course did not receive them. Defendants Hamlin, Nickerson & Co. had, meanwhile, bought the certificates in good faith and for value, in open market.

The trial court found that the cashier had stolen from the bank the certificate in controversy, and that the conduct of the plaintiff, in pledging it endorsed in blank, was not negligence and refused to find, as requested by the defendants, that the disposal of the certificate was the unauthorized act of the bank itself, or that plaintiff was estopped from asserting his title to the certificate.

In affirming the judgment of the court below the appellate court said:

"If the sale of this certificate of stock was the act of the bank, the appellants should prevail; for the weight of authority is that where, by a wrongful or unauthorized act, two innocent persons have been placed in a situation where a loss must be borne by one of them, it falls on the one who first trusted the wrongdoer and put in his hands the means of inflicting the loss. Scollans *vs.* E. H. Rollins & Sons. 179 Mass., 346; 88 Am. St. Rep., 386; 60 N. E., 983; East Birmingham Land Co. *vs.* Dennis, 85 Ala., 565; 2 L. R. A., 836; 7 Am. St. Rep., 73; 5 So., 317. But the court found that the act of abstracting and selling the certificate was not the act of the pledgee bank, but of one of its officers, for a purpose personal to him. In our opinion this finding is abundantly supported." * * *

"The chief contention of appellants is that plaintiff, by pledging the certificate, indorsed in blank, and by the authority given in the note to the cashier to sell in case of default, is now estopped from asserting title as against an innocent good-faith purchaser for value. The only act of plaintiff upon which appellants may claim that they relied in making the purchase is the blank indorsement of the certificate. But the law is that the blank indorsement on a share certificate of stock does not, in itself, estop an owner from claiming it, in a case where it has been stolen from him and has passed into the hands of an innocent holder for value. A certificate representing shares of stock is not negotiable paper in the sense that the title transferred by a thief to an innocent good-faith holder cannot be questioned. This is conceded to be the law in the cases relied on by appellants. Shattuck *vs.* American Cement Co., 205 Pa., 197; 97 Am. St. Rep., 735; 54 Atl., 785; Beckwith *vs.* Galice Mines Co., 50 Or., 542; 16 L. R. A. (N. S.), 723; 93 Pac., 453. See also Barstow *vs.* Savage Min. Co., 64 Cal., 388; 49 Am. Rep., 705; 1 Pac., 349; O'Herron *vs.* Gray, 168 Mass., 573; 40 L. R. A., 498; 60 Am. St. Rep., 411; 47 N. E., 429; Knox *vs.* Eden Musée Americain Co., 148 N. Y., 441; 31 L. R. A., 779; 51 Am. St. Rep., 700; 42 N. E., 988.

"In the present case it is found that, in pledging the certificate indorsed in blank with the bank, plaintiff was not negligent; hence no estoppel on that

ground. The finding cannot well be challenged. The bank was a national bank in good standing. Pledging stock certificates as security for loans at banks is so common and extensive in the business world that no one questions the care and prudence of the one who thus trusts the possession of his property to a going bank. In order to make such a pledge available, it is customary, and perhaps necessary to have certificates indorsed. But it is claimed that by pledging the certificate plaintiff intrusted its possession to the officers of the bank, because the bank could exercise control over the property only through its officers or servants. Therefore, having placed the certificate in the bank, where, of course, its cashier had access to it, the contention is plaintiff trusted to his honesty, and the cashier having abused this confidence, plaintiff, and not appellants, must bear the loss. We are cited to no case which holds that, where property of this kind has been intrusted to a corporation for safe keeping, *theft thereof by any of its officers or servants will estop the owner* from asserting title thereto as against the title derived through the thief by an innocent good-faith purchaser for value. We have already adverted to the fact that plaintiff dealt with and trusted the bank,—not any of its officers. And it would seem a reasonable view that, unless the disposition of such property by the act of the corporation, the officer or agent concerned in such disposition may be regarded as an intermeddler and outsider." * * *

"We are also invited to hold, in effect, that share certificates of stock are negotiable instruments, and hence an innocent good-faith purchaser for value takes title as against the true owner, who has been deprived of possession by theft, because it is claimed that there was proven a custom among banks and brokers for certificates of stock with the transfer on the back indorsed in blank to pass from hand to hand without inquiry, the same as negotiable paper. A custom which runs counter to the settled and established law is not to be adopted by the courts. If a crying demand exists in the business world to have certificates of shares in corporations placed on a parity with negotiable paper in every respect, it is a proper matter for legislative investigation and action" (pp. 182, 183, 38 L. R. A. (N. S.).

Having thus at some length cited and quoted from the authorities which we believe most illustrative of the two classes defined at the beginning of this discussion of the doctrine of estoppel, we pass to an analysis of the points of distinction between them in order that the present case may be properly placed.

The elements necessary to an estoppel gleaned from the authorities under the first head are:

1. *The voluntary surrender to* ANOTHER *by the owner or rightful holder of a certificate of stock or other instrument, of the possession thereof, in such condition as to clothe such other with the indicia of ownership, so as to enable him to deal with the public as its owner.*

2. *The commission of a fraud or the perpetration of a crime such as larceny is not* NECESSARY *before the certificate or other document can pass out of the possession of the owner or rightful holder thereof.*

3. *The voluntary surrender to* ANOTHER *of possession of such instrument, accompanied by the indicia of ownership, must be the* PROXIMATE CAUSE *of the loss to the original owner.*

In the cases under the second head, the above elements are absent, and the existence of an estoppel is denied, because—

1. *The possession of the document by the wrongdoer is obtained without the knowledge or consent of the owner of the instrument, and there is no voluntary surrender thereof to the former.*

2. *Before the wrongdoer can obtain possession of the document, a criminal act such as larceny or a taking away without consent is necessary, as distinguished from the pos-*

sible use of a technical criminal act by way of fraud to induce a VOLUNTARY SURRENDER *of possession of the instrument.*

3. *The criminal act is the* PROXIMATE CAUSE *of the loss or conversion of the document; or, in other words, is the proximate cause of the opportunity afforded the wrongful holder of the instrument to transfer it to an innocent purchaser or pledgee.*

In every case included in the first class, possession of the certificate or other muniment of title has passed to the perpetrator of the wrong, by the *voluntary act* of the owner, and it is confidently submitted that opposing counsel can find no case in which an estoppel has been applied where that has not occurred and been the controlling factor. Even where, as in Russell *vs.* Telephone Co., 180 Mass., 467, *supra* (a case which extends the doctrine of estoppel to its limit), a fraud, which in Massachusetts might be of the character of a technical larceny, is practiced upon the unsuspecting owner of certificates of stock to obtain them, the predicate of the estoppel is the voluntary surrender of them to the perpetrator of the fraud, so that the power and opportunity to defraud others has been voluntarily bestowed upon him. But even in such an extreme case the same result would have taken place if the wrongdoer had honestly gotten possession of the certificates with the intention of carrying out the purpose for which he had received them, and had thereafter, and before carrying out such purpose, disposed of them as his own. It is for this reason doubtless that the court in the Russell case deemed the perpetration of the fraud, even though a crime, immaterial, and if immaterial it was not necessary to the surrender of possession. In other words, an honest or dishonest purpose in obtaining the document was equally consistent with the operation of an estoppel because of the fact that the owner *voluntarily*

gave this opportunity to the guilty party to *deal with the public* with the apparent ownership of the paper.

In all the cases of this class, without exception, the negligence of the owner has flowed from this voluntary surrender of possession and bestowal of opportunity to defraud upon another, and has been held to be the *proximate cause* of the deceit practiced upon an innocent party.

In the cases embraced in the second class there was no voluntary surrender of possession of the instrument by the rightful owner. It is not necessary that it be stolen by force, or as by a thief in the night. The wrongdoer may be trusted with access to it, have a key to its depositary; may have manual possession of it as a servant or employé of the owner, such possession being the owner's possession—a situation most frequent in the case of a corporation which can only have possession of a document by and through its officers or servants. It need only appear that such servant or employé takes the instrument out of the owner's and into his own possession, and that act is performed without the knowledge and consent of the owner, and the existence of an estoppel is then negatived. That act then becomes the proximate cause of the power and opportunity to defraud or deceive an innocent party with the wrongdoer's apparent title, and the true owner is not responsible.

And in the case of a corporation, the transfer from its possession and custody to the possession of a servant takes place when he does some act not within the scope of his employment by which he appropriates the instrument and uses it as his own without the knowledge of his employer; for a corporation is not responsible for the unauthorized act of its servant not done within the scope of his duties.

Knox *vs.* Eden Musee Co., 148 N. Y., 441; 31 L. R. A., 779.

Hill *vs.* Jewett Pub. Co. (Mass.), 13 L. R. A., 193.

Farmers' Bank *vs.* Diebold, &c., Co., 66 Oh. St., 367.

In such a situation the reasoning is simple. The owner has not clothed the servant with a power to deceive. The servant takes the power with the document, unknown to the owner; if he uses it, the deceit is complete. So long as the servant uses the document in accordance with his duty, it remains in the possession of the master. When he takes it away in violation of his duty, it leaves the possession of the master. This taking away is a necessary prerequisite to the opportunity to deceive, to deal with the public as owner, for which the rightful holder is not responsible.

Thus we are brought to the proposition that a crime *is necessary* in this class of cases before the wrongdoer may deceive others; he clothes himself with the indicia of ownership. For a servant to thus take away a document or other property from his master—although it has been intrusted to his custody—and convert it to his own use, is larceny at the common law.

1 Wharton Crim. Law (8th ed.), sec. 915.
II Bishop Crim. Law (7th ed.), secs. 824, 825.
18 Am. & Eng. Ency. Law (2d ed.), pp. 474, 475, 511.

And see Code, District of Columbia, section 826, which defines grand larceny as the feloniously taking and carrying away anything worth more than thirty-five dollars, and section 732, which reads in part: "Any misappropriation of any of the money of any corporation or company formed under this act [which relates specifically to trust companies] or of any money, funds or property *intrusted* to it, shall be held to be larceny and shall be punished as such under the laws of said District."

We come now to a discussion of the facts of the case at bar, in order to ascertain under which of the two classes of cases it falls.

1. *There was no voluntary surrender by the plaintiff trust company to Myers of the possession of the certificates of Mergenthaler stock.*

Myers was a trusted servant of the company, and had been such for many years prior to his act of malversation. It was a part of his duties to handle within the banking house of the company, as acting note teller, certificates of stock pledged with the company, in order to return them to such customers as might pay their loans. He had no duty to pledge, sell or dispose of the company's securities or to take them out of its offices. While it does not appear he had access to the safe directly, he had such access indirectly through the secretary, to obtain stock certificates for the purpose above mentioned. Suppose a customer of the trust company appeared, paid his note, and Myers, in the ordinary course of business, obtained his certificates pledged as security therefor from the secretary. Up to the time he delivered them to the customer they were certainly in the possession of the company. The manual possession of Myers was its possession. Let us assume that when Nyman handed the certificates to Myers, on the occasion in question, Kelly had been present at the note teller's window waiting to receive his stock, and Myers, in good faith and without evil intent, had received them from Nyman, who had handed them to him for the purpose of delivery to Kelly. Until delivered to the latter the trust company would clearly have had possession of the securities. Suppose further that Myers, seeing Kelly waiting at his window, and yielding to sudden temptation, had, with the certificates of stock in his pocket, slipped out of a door, gained the street, and, entering the office of Hibbs & Company, sold the stock and converted the money to his own use in the manner described in the agreed statement of facts. Could it be doubted that he would then have been guilty of a larceny, as defined above, of taking from the trust company, without its knowledge or consent, the securities of

which it had possession up to the moment Myers left the four walls of its banking house? How did the absence of Kelly, and the fraud practiced upon the secretary, Nyman, when Myers falsely told him Kelly was there waiting to pay his loan and receive his stock, change the situation in the slightest degree? The certificates were handed to Myers by Nyman in good faith and in the usual course of business, solely for the performance of a duty which did not take Myers beyond the offices of the company. So long as he remained within these offices, where he belonged, he could not deal with the stock as his own, and the public could not deal with him as the owner of it. He was not "exhibited to the world as owner with the assent of his principal" (2 Kent Com., 627). His manual possession was the company's possession at that moment, exactly as it would have been if he had obtained the certificates in good faith on his part. In no sense could it be said that the company had, in the language of the cases cited in the first class, "intrusted the certificates to *another*" or to a "third person." It was only when Myers left the building of the plaintiff in error and took the securities with him, without the knowledge or consent of the Trust Company, that he, by committing larceny, got possession of them. He *then* became a "third person," a stranger to the company, and *then only* could the public deal with him as the apparent owner of the certificates.

Compare this situation with that in Knox *vs.* Eden Musee Company, *supra*. There Jurgens, the guilty employee, had access to the company's safe, where were deposited the surrendered certificates to be canceled by him. The president of the company had directed Jurgens to cancel them, and they were left in his care and under his control for that purpose. Counsel there urged that the improper use of the certificates might reasonably have been expected from that state of facts. To this suggestion the court declined to assent, for the reasons already quoted earlier in this brief. The court said:

> "The certificates were at all times after their surrender, and before they were abstracted by Jurgens from the safe of the defendant, in the legal possession of the company. The company never placed them in the possession of Jurgens or invested him with the *indicia* of ownership. He had access to the safe as the mere servant of the defendant" (p. 783, 31 L. R. A.).

It is clear also that if Jurgens, after taking them from the safe, had canceled the certificates, as was his duty, they would then at all times have been in the company's possession. It was only when he left the office of the company to dispose of them that they came, by theft, into his own possession. Suppose the president of the defendant in that case, instead of placing the certificates in the company's safe and directing Jurgens to cancel them, had himself handed them to Jurgens for the purpose of cancellation by the latter; certainly, when Jurgens received them they would still have been in the possession of the company. The distinction between the supposed case and the real one is without a difference. Yet, applying to the former the ruling of the Court of Appeals in the case at bar, Jurgens would have been clothed with the *indicia* of ownership and the possession of the certificate, and estoppel would have ensued.

So, conversely, in the present case, following the reasoning of the Court of Appeals, if Myers had been given access to the safe so that he could have himeslf procured securities therefrom for delivery to customers who might be entitled thereto, and had on the occasion in question here gone to the safe, taken from it the Mergenthaler certificates and converted them as described in the agreed statement, the securities would have been considered stolen, no estoppel would have arisen, and recovery for the plaintiff would have been adjudged. We cannot see how the commission of a theft is negatived, or an estoppel is engrafted, or wherein the application of the principles declared in the cases in the second class is affected, by the

fact that Myers obtained the securities from the safe *through Nyman* for an apparent purpose in line with his duties and then absconded, instead of using a direct right of access to the safe to effect the same result.

Therefore there can be no doubt that the plaintiff company did not voluntarily surrender its possession of the certificates of Mergenthaler stock to Myers, but that he stole them from its possession; and it follows that the first and essential element of estoppel existing in every case of the first class is absent in this case, and as to that point it is within the principles of the cases of the second class.

The Court of Appeals considered that it was negligence for Nyman to hand or "intrust" the stock to Myers, and applied the rule that when a loss occurs, as between two innocent persons, it should fall upon the one whose act was the proximate cause of the loss. But that rule is not applicable to the case at bar. In the first place, as has already appeared, Nyman's act was not, as assumed by the Court of Appeals, the proximate cause of the loss; and this fact will be referred to hereafter. Again, to properly invoke the rule, some negligence must be found in the act claimed to be the proximate cause of the loss (Schumacher *vs.* Green Copper Co., 117 Minn., 124, *supra*). If it were negligence in Nyman to follow the usual course of business and put trust and confidence in a servant or employee of the company, then every official act of an officer or employee of a corporation trusting another officer or servant is a negligent act.

The logical result of the decision of the Court of Appeals, therefore, is to preclude any officer or servant of the plaintiff in error, except the Secretary, Nyman, or such other officer or employee as may have originally received them, from having even a momentary possession of its securities endorsed in blank; because the instant he or the original recipient handed them to any other officer or servant the company would be open to the imputation of negligence

by reason of that fact, if the servant to whom such securities were so delivered—although for the performance of a duty within the banking room of the company—were to abscond and transfer them to a *bona fide* purchaser for value; and the company would then be estopped from claiming such securities or recovering their value. Such an extraordinary application of this rule is fraught with danger to the transaction of corporate business and is not sanctioned by the law. As we have already seen,

> "There must be something more than the mere intrusting to a servant of the custody of a chattel and the consequent opportunity for theft in order to preclude the master from reclaiming it, if stolen by the servant and sold to another. Rapallo, J., in McNeil *vs.* Tenth Nat. Bank, 46 N. Y., 329. The rule declared by Ashhurst, J., in Lickbarrow *vs.* Mason, 2 T. R., 70, frequently quoted, that 'wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it,' has no application to such a case."
>
> Knox *vs.* Eden Musee Co., *supra* (p. 783, 31 L. R. A.).

Myers was not given possession and clothed with a power of disposition, for it was never intended, nor was there any reason to suppose, that he would leave the banking-house of the plaintiff in error. It was not a duty incumbent upon Nyman to have anticipated that Myers would commit the crime of larceny if he handed to him the certificates (Knox *vs.* Eden Musee Co., *supra*), and if he had no such duty, he, of course, could not have been guilty of negligence in so handing them to Myers. The most that could be said is that the latter was given an "opportunity for theft." To apply the rule in such a case would compel every corporation to employ a corps of detectives to watch the official acts of its officers and employees or to dispense with all save one of the latter. And in no case cited in this brief

under the second class was the rule applied, although in each opportunity for theft existed. Where an application of the rule was urged, it was refused.

2. *The crime of larceny was a necessary act before Myers could obtain possession of the certificates.*

What has heretofore been said has shown that without the commission of a theft the possession of the certificates in controversy would have remained in the possession of the plaintiff in error. A word may be added, however, with respect to the custom referred to in the agreed statement of facts (Rec., p. 6). This custom was by no means as sweeping as that which obtained in Boston at the time of the second trial of Scollans *vs.* Rollins, 179 Mass., 346, *supra*. There the usage was *to pass title* to certificates duly assigned in blank, by delivery, and that, so endorsed, they passed from hand to hand without inquiry as to the title of intermediate holders. The custom in the present case was that possession of certificates endorsed in blank was recognized as *evidence* of ownership. We might truly say that possession usually is *evidence* of ownership. But of what materiality is the existence of such a custom in this case? Before it could be invoked by Myers, he had to purloin the certificates from the trust company. While he remained within its banking-room the custom was nothing to him and could not operate. Nyman, though doubtless knowing of the custom, had no reason to suspect its operation, as he trusted Myers with the certificates for a purpose utterly inconsistent with their removal by him from the custody of the company and its banking office to a place where the custom could be employed. If, as we have already seen, it was not incumbent upon him to anticipate that Myers would commit larceny, still less should he have anticipated that there was danger of the custom being invoked, which that could not happen unless the theft of the certificates had first taken

place. For the theft of the certificates *necessarily* came between the act of Nyman in handing them to Myers and their conversion by Hibbs. Therefore, the custom is an immaterial circumstance in the present case, and should play no part in its determination.

From the above, then, it must appear that—

3. *The criminal act of Myers was the proximate cause of the conversion of the certificates of stock, and not the act of Nyman intrusting him with them as a servant of the trust company.*

Inasmuch as the Court of Appeals in its opinion has given much weight to the case of Russell *vs.* Telephone Co., 180 Mass., 467, 469, already mentioned, saying in part (Rec., p. 20)—

> "That case and this are quite analogous, for in both the delivery to the agent was obtained through fraudulent representations and for a very different purpose from that avowed,"

and counsel for defendant in error in that court relied upon it as an important and "absolute and direct" authority in support of his contentions, it may not be inapt at this point to further distinguish that case from the present, even with the risk of some repetition; it will then appear that no analogy exists, and that the two cases rest upon widely different principles arising from facts greatly dissimilar.

As we have seen, in the Russell case, although possession of the certificates of stock indorsed in blank was obtained by means of fraudulent representations, nevertheless the owner, believing in the truth of such representations, *voluntarily surrendered* such possession to the broker who made them, intending that he should take them away from her custody, and *knowing* that he would be able to deal with the public therewith by sale or pledge, because he was clothed with the power to use them as his own.

It is *this fact,* whether it be termed fraud or larceny or other technical crime, which is controlling in the opinion of the court.

If, in the present case, some broker had, though with fraudulent intent, entered the banking-house of the plaintiff in error, and requested the secretary, Nyman, to deliver to him the certificates of Mergenthaler in question for the stated, though untrue, purpose, let us say, of taking them to his own office and there exchanging them for a single certificate representing a like number of shares, and Nyman, believing in his honesty, had delivered the certificates (assuming this to be within the scope of his authority), and thus intrusted the broker with them, who thereafter converted them to his own use—then an analogy might exist between the two cases and the decision in the Russell case apply. In such a supposed case the Trust Company through Nyman would voluntarily, though induced so to do by fraud, have surrendered possession of the certificates to one not a servant of the company, with *knowledge* of opportunity and the power to deceive others with which the company would have then invested him. And the broker in such case would have received the certificates from the possession of the company *with its full consent.* The fraudulent conversion of the certificates might have been anticipated by the Trust Company in the delivery of the stock to the broker, clothed with the *indicia* of ownership. The controlling fact upon which the estoppel in the Russell case was predicated would have then been present.

From what has been said heretofore, the difference between the real facts in the present case and those just supposed appear at once. We have shown that the plaintiff in error did not voluntarily surrender possession of the certificates in controversy; that Myers was not intrusted with them to take out of its possession where he could pledge or transfer them; that no legal obligation rested upon the company to anticipate *both* the larceny of the

stock and its conversion thereafter; that Myers took them from the plaintiff company without its knowledge or consent, and that by the commission of such theft *alone* was it possible for him to have them where by dealing with them as his own he could deceive others. These points of difference absolutely destroy the foundation upon which in the Russell case the estoppel was erected, and they were completely overlooked by the learned Court of Appeals in the present case, when it classed the two cases as analogous. And in applying the Russell case the same learned court considered that the crime of Myers consisted in the fraud by which he obtained the certificates of Nyman, and ignored his real criminal act in taking them from the custody and possession of the Trust Company.

In concluding this branch of the argument we feel justified in asserting without fear of contradiction that no authority can be found in which the doctrine of estoppel has been applied to defeat the title of the rightful owner of a non-negotiable instrument, when the proximate cause of his loss was the criminal act of another, even though such other were given the opportunity to commit the criminal act by a repose of confidence in him, where no fact or circumstance existed to cause suspicion that such confidence would be abused. In those cases where estoppel has arisen the opportunity to the abuse of trust and to deal with the public as an owner has been directly and voluntarily bestowed and no criminal act has intervened to negative the direct and proximate causation of loss by the act of the rightful owner of property in voluntarily clothing another with power to deceive.

Therefore, by reason of all that we have said on this subject, and upon the authorities cited, we respectfully submit, that the case at bar falls clearly within the principles of the cases which we have designated as of the second class, and that the learned Court of Appeals erred in applying to the facts therein the doctrine of estoppel to defeat the right of the plaintiff in error to recover.

III.

The defendant in error is liable even though the court should consider the circumstances under which Myers obtained the stock in controversy such as to vest a good title in a bona fide purchaser for value.

The authorities cited under point I are applicable to the proposition just stated, because we have seen that the certificates of stock in controversy were stolen by Myers from the plaintiff in error, but the following suggestions are presented for the consideration of the court, assuming for the sake of the argument only, that the Court of Appeals was correct in its application of the doctrine of estoppel to the case at bar.

The very meaning of "*bona fide* purchaser" precludes knowledge on the part of such purchaser of a fraud committed. If any person buying stock under conditions in which an estoppel in his favor would otherwise obtain is cognizant of fraud or crime tainting the transaction or transactions by which the stock comes into his hands from the rightful owner thereof, he gets no title and the owner may recover his property in the hands of such person.

Going back a step, of course the one who perpetrates the fraud or crime has no title; his possession is tortious, and it is only when, the negligence of the owner being the proximate cause, a purchaser in good faith, who is *not an agent* of or who does not represent the wrongdoer, obtains the property that the owner suffers the loss.

In the present case no recovery is sought as against a *bona fide* purchaser. The title of an innocent holder is not involved. If it were, the defense of such title on the ground of the negligence of the owner sufficient to raise an estoppel might be appropriate, though in this case, as we have argued, inapplicable and unavailing. But here we have to deal, not only with one who makes no claim to the stock, but was the

agent of the wrongdoer and acted in no other capacity. The fact that he was without knowledge of the fraud does not relieve him of responsibility. He acted for one who committed the wrong, and the step when *bona fides* protected in a proper case was not reached, if at all, until the property had passed beyond the control of the perpetrator of the wrong and his agents. The protecting innocence of a *bona fide* holder cannot be extended to the agent of a wrongdoer. In the case of Kimball *vs.* Billings, 55 Me., 147, *supra* where, it will be remembered, a broker sold for a thief negotiable bonds payable to bearer, the court, in holding the broker liable for conversion, said:

> "Nor is it any defense that the property sold was Government bonds payable to bearer. The *bona fide* purchaser of stolen bonds payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a *bona fide* holder. The rule of law protecting a *bona fide* purchaser of lost or stolen notes and bonds payable to bearer has never been extended to persons not *bona fide* purchasers, nor to their agents."

In the case of stolen negotiable instruments even, although a *bona fide* purchaser gets a good title, the broker, as the innocent agent of the thief, is responsible for the conversion thereof.

In the case of non-negotiable instruments, such as certificates of stock indorsed in blank, no title vests in a *bona fide* purchaser if the property was stolen or unless it came into the hands of such purchaser by reason of the fault or negligence of the owner. In other words, the carelessness of the owner, if it was the proximate cause of the loss of the certificates, impresses a *quasi* element of negotiability upon them for that particular transaction and protects the purchaser. But that *quasi* element of negotiability in no manner affects the act and responsibility of the wrongdoer or his

agent, however innocent that agent may be, as we have seen in Kimball *vs.* Billings, *supra*, from which we have just quoted. In other words, the acts and conduct of the owner of stock certificates may be sufficient to defeat his title as against a *bona fide purchaser* from one who has wrongfully disposed of the owner's stock, but the wrongdoer is, of course, not relieved from responsibility, and his agent is equally responsible for a conversion of the property.

Therefore, it follows that even if the circumstances surrounding the taking by Myers of the certificates of Mergenthaler in question showed conduct on the part of the plaintiff in error sufficient to vest title in a purchaser, which we emphatically deny for the reasons and on the authorities hereinabove set forth, the defendant in error is none the less liable for the conversion of the certificates as the agent of Myers.

In its opinion, the Court of Appeals cites on this point the case of Spooner *vs.* Holmes, 102 Mass., 503, 507, which seems to be in part at variance with Kimball *vs.* Billings, *supra*. In the former case Government bonds were stolen from the owner by a servant who gave them to her sister, the latter being a domestic in another family. The sister left for Nova Scotia and thence sent some of the coupons payable to bearer to a broker, who received them in ignorance of the circumstances under which they had reached her. The broker sold them and duly remitted the proceeds. The court held that he was not liable in a tort action in the nature of trover, but placed its decision on the ground that the coupons payable to bearer were the equivalent of currency; admitting, however, the rule that the sale of goods by an innocent agent of one who has wrongfully obtained them from the true owner, renders the agent liable in trover to the latter.

In conclusion, we quote further from the opinion of the court in Swim *vs.* Wilson, 90 Cala., 126, *supra*:

> "In this case it was the duty of the defendant to know for whom he acted, and unless he was willing

to take the chances of loss, to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a liability by the conversion of property not belonging to such principal."

For all the reasons above stated and upon the authorities cited it is respectfully submitted that the judgment of the Court of Appeals should be reversed with direction to reverse the judgment of the Supreme Court of the District of Columbia.

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A. S. WORTHINGTON,
Of Counsel.

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TABLE OF CASES.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 79.

NATIONAL SAFE DEPOSIT, SAVINGS AND TRUST COMPANY,
Plaintiff in Error,

vs.

WILLIAM B. HIBBS, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is an appeal from a judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia in an action of trover brought by the plaintiff in error, hereinafter called the plaintiff, against the defendant in error, hereinafter referred to as the defendant. The case was tried in the lower court upon an agreed statement of facts, set forth at pp. 4-7 of the record, of which the following are the material facts:

The plaintiff, engaged for many years in a general banking business, including the making of loans to its customers on promissory notes secured by collateral, had received from one T. M. Kelly, as collateral security for his promissory note held by it, certain certificates of the capital stock of the Mergenthaler Linotype Company, among which were certificate No. 1105, representing twenty shares, and No. 669, representing ten shares, upon each of which certificates was endorsed an assignment and power of attorney, blank as to the assignee, duly executed by Kelly and attested, possession of which stock certificates, so assigned in blank and attested, was and for many years had been by the custom of banks, brokers and others dealing therein, and which custom was known to the plaintiff, recognized and accepted as evidence of ownership or authority to sell, pledge or otherwise deal therewith as an owner might do, in the absence of knowledge or cause of suspicion to the contrary. Among its employees was one Myers, for many years in its service as a note teller, one of whose duties it was to receive from the plaintiff, through its secretary, securities held by it as collateral, for the purpose of delivering the same to customers upon their payment to him of the indebtedness for which the securities were held. On May 26, 1904, Myers applied to the secretary for the Kelly Mergenthaler securities, who thereupon gave the same to him for the purpose of delivery to Kelly, the certificates, as stated, being so assigned in blank as, to the knowledge of the plaintiff, to constitute evidence to all banks, brokers or others dealing in such securities, that Myers, being in possession of them, was their owner, with authority to sell, pledge or otherwise deal with them as an owner might do. On the following day, the certificates having been left by the plaintiff in the possession of Myers overnight, unaccounted for, he presented them at the office of the defend-

ant, a stock broker, with instructions to sell them for him, which, the defendant being then absent from Washington, his cashier caused to be done through another broker, and accounted for their proceeds to Myers. Neither the defendant, his cashier, or the broker through whom the sale was effected, knew, suspected, or had cause to suspect that Myers was not the owner of the stock. Kelly had not paid his debt to the plaintiff, nor requested the delivery of the stock certificates to him.

It is apparent, from these conceded facts, that the loss arose wholly through the misplaced confidence of the plaintiff in one of its own employees. Its action below was an attempt to impose the resulting loss upon the defendant. The trial court rendered a judgment for the defendant, which was affirmed by the Court of Appeals, and the case is here on the plaintiff's writ of error to determine the rightfulness of the judgment.

Points and Authorities.

The opposing brief considers, as preliminary questions which it is supposed will not be disputed, certain alleged principles of law which, while in themselves perhaps true, it is submitted are misleading in the application sought to be made of them.

In the first place, while the authorities cited to that effect do maintain that certificates of stock are not negotiable instruments, they are nevertheless universally recognized as possessing certain attributes in common with commercial paper, which have led to their designation by some courts as "*quasi*-negotiable," although the use of that term is condemned by the text writers as being, itself, misleading. 26 Am. & Eng. L., 831.

Thus, it is declared, "stock certificates of all kinds have

been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. * * * Whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him." Bank vs. Lanier, 11 Wall., 369, 377; Earle vs. Carson, 188 U. S., 42, 46; Supply Ditch Co. vs. Elliott, 10 Col., 327, 333; Bank vs. Cemetery Co., 120 App. Div. (N. Y.), 119; 5th Nat. Bank vs. R. R. Co., 137 N. Y., 231, 238; Jarvis vs. Rogers, 13 Mass., 105; Lyman vs. Bank, 81 App. Div. (N. Y.), 367, 371.

Illustrative of the extent of this doctrine is Matthews vs. Bank, Holmes (U. S.), 396, 407, in which a stock certificate, originally for two shares, had been fraudulently altered so as to purport to be for two hundred shares, issued as collateral to a bank by which it was received in good faith, and, on payment of the loan secured by it, its cashier executed a transfer in blank on the back of the certificate and delivered it to the debtor, from whom the plaintiff in good faith received it. In a suit by him against the bank to recover the loss, the latter was held liable as for a warranty of the genuineness of the certificate, because of its endorsement, the court saying: "The certificate accompanied by the transfer, executed in blank, has a species of negotiability of a peculiar character, but one well recognized in commercial transactions and judicial decisions, and absolutely essential in the usage and necessity of modern commerce to make such certificates available in commercial transactions."

So in Bridgeport Bank vs. R. R. Co., 30 Conn., 231, 275;

"Since the decision of the case of McNeil vs. Tenth National Bank, above cited, certificates of stock, with blank assignments and powers of attorney attached, must be nearly as negotiable as commercial paper." Leitch vs. Wells, 48 N. Y., 585, 613.

To similar effect are Steacey vs. R. R. Co., 5 Dill., 348; Bank vs. Pinson, 58 Mass., 421, and the cases cited *infra*.

The next proposition, stated preliminarily in the opposing brief, is that, since no custom or usage can alter or affect a well-settled principle of law, no custom or usage of brokers to regard certificates of stock assigned in blank as negotiable, makes them so, or alters the law applicable to them as non-negotiable securities. In the first place, the custom or usage presented here is not merely one recognized by brokers, but by the courts, as presently shown, see *infra.*, p. 25; and, secondly, the authorities cited in the brief (p. 6), in so far as applicable at all, deal with customs and usages which conflict with the law. Thompson vs. Riggs, 5 Wall., 663, perhaps the most applicable of the cases cited, was the case of a local usage contrary to law, and, in disallowing it, the court said: "Customary rights and incidents universally attaching to the subject-matter of the contract in the place where it was made, are impliedly annexed to the language and terms of the contract, unless the custom is particularly and expressly excluded." In the case at bar, the custom involved is not in conflict with any law, and, under the agreed facts, was not only the recognized custom of banks, brokers and others dealing in stocks, but was directly known to the plaintiff. The rule applicable to such a custom is, that "parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary." Robinson vs. United States, 13 Wall., 363, 366; Hostetter vs. Park, 137 U. S., 30, 40; Shipman vs. Mining Co., 158 U. S., 356, 364.

In Thompson vs. Riggs, 5 Wall., 663, and in Barnard vs. Kellogg, 10 Wall., 383, cited upon this point by the plaintiff, it is further to be noted that the decisions turned upon the admissibility of evidence as to the custom. In the case at bar, its existence, and the plaintiff's knowledge of it, are admitted in the agreed statement of facts, nor was any exception taken to its consideration by the court.

The third question considered preliminarily in the opposing brief, that a pledgee of certificates of stock has sufficient title to maintain an action for damages for their conversion, is conceded, but, so far from aiding, is fatal to plaintiff's case. It delivered the certificates in controversy to Myers for the express purpose of having him transfer its title to and property in them to another, knowing, at the time, that they were so endorsed as to make him appear the owner, and to enable him to transfer the title to anyone who innocently received them from him. It is by virtue of the very title, which it thus entrusted him to transfer, that it brought its action below;—leaving it no other basis for recovery than the fact that its agent, selected and entrusted by itself to transfer its title to one person, transferred it to another, through the aid of its own act in making him the apparent owner, authorized to transfer to any person or persons he thought proper. Its position, in short, is the same as that which Kelly or any other owner of title would have occupied, had he placed Myers in possession of the certificates, with all the indicia of ownership, for delivery to a particular person, and Myers had delivered to another, without suspicion or cause for suspicion on the part of the latter as to his good faith in doing so.

The Single Question Presented.

The case, it is submitted, presents but a single question of law, namely:

Is a broker who innocently sells stocks for a principal, not their rightful owner but possessing all the indicia of ownership, liable to the true owner for conversion, where his principal's possession and indicia of ownership were given the latter by the true owner?

The answer to this question, we submit, is found in the legal principle, "Where one of two equally innocent parties must suffer loss, through the fraudulent act of a third, the loss should fall on him who, through either negligence or misplaced confidence, gave opportunity for the fraud." And this principle, we submit, knows no such distinctions between innocent purchasers and equally innocent brokers or other agents used by the wrongdoer in effecting sale, as is contended for in the brief for the plaintiff in error. No such distinction can exist in reason or principle, and none is supported by any authority.

The cases principally cited on behalf of the plaintiff in error are those in which property, stolen from the true owner, has been sold through the instrumentality of auctioneers, brokers or the like, and in which the latter have been held liable to the owner for the value of the stolen property thus disposed of. To this class of cases belong Koch vs. Branch, 44 Mo., 542; Hoffman vs. Carow, 22 Wend., 285; Swim vs. Wilson, 90 Cal., 126; Bersich vs. Marye, 9 Nev., 312; Kimball vs. Billings, 55 Me., 147; Coles vs. Clark, 3 Cush., 399; Kearney vs. Clutton, 101 Mich., 106; Board of Education vs. Sinton, 41 Ohio St., 504; Hill vs. Jewett Pub. Co., 13 L. R. A., 93; O'Herron vs. Gray, 168 Mass., 573; Farmers' Bank vs. Diebold Safe & Lock Co., 66 Ohio St., 367; Bangor Elec. L. & P. Co.

vs. Robinson, 52 Fed., 520; Doran vs. Miller, 124 Ill. App., 551; S. C., 151 Ill., 527, etc. And with respect to the remaining citations for the plaintiff in error, if the transaction was not strictly one of theft, it will be found that the courts treated them as in substance cases of theft, and based their decisions upon that footing. Thus in Shaw vs. R. R. Co., 101 U. S., 557, the verdict having established the fact that the bank did not lose its possession of the bill of lading negligently, the court accordingly treated the case (p. 564) as one of "a lost or stolen bill of lading," the court finding, further (p. 566), that the purchaser had reason to believe that his assignors had no right to negotiate the bill. And in Schumacher vs. Green Cananea Copper Co., 134 N. W., 510, supposed by plaintiff's counsel to be latest decision upon the subject, the court found that the stock was deposited with the bank, and not with its cashier by whom it was abstracted, and for whose conduct, therefore, the owner, who was guilty of no negligence or misplaced confidence in leaving it as collateral for a loan with a reputable national bank, was not responsible. This class of authorities, we submit, are by this very fact wholly removed from any such analogy to the case at bar as to make them relevant, in any degree, to the inquiry under consideration. In them the wrongdoer, not having acquired his *indicia* of ownership through the negligence or misplaced confidence of the owner, but by theft, the latter is not chargeable with having furnished opportunity for the fraud. The principle contended for by the defendant, and which the lower courts sustained and made the basis of their judgment, was, in them, in no way involved.

This consideration renders immaterial, also, the contention for plaintiff, at p. 39 of its brief, that a servant taking over his master's property entrusted to his custody may be guilty of larceny. The question is, not the grade, or name,

of the wrongdoer's offense, but whether the owner negligently or through mistaken confidence gave occasion or opportunity for the fraud. If he did so, then he rather than the other innocent person should bear the loss, even though the wrongdoer was guilty of theft. Even in cases of theft, "it may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness." Shaw v. R. R. Co., 101 U. S., 565.

> "The qualification of the rule, as not applying when the instrument is stolen, was not based upon the name of the agent's crime, but upon the fact that, in the ordinary and typical case of theft, the owner has not entrusted the agent with the document, and, therefore, is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough, if the estoppel is based upon the principle that, when one of two innocent persons is to suffer, the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But, in a case like the present, the agent has been entrusted with the converted property, and it is totally immaterial whether, by a stretch which extends larceny beyond the true field of trespass, his wrong has been brought within the criminal law or not." Russell vs. Telephone Co., 180 Mass., 467.
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> To like effect, see Green vs. Grigg, 98 App. Div., N. Y., 445, 449.

Auctioneers and Brokers Liable, When and Why?

It is only in the cases in which the owner is free from fault that an innocent auctioneer or broker is held liable to him, and this for an entirely proper and simple reason. A purchaser in such cases, however innocent, acquires no title,

and the rightful owner may, if he will, retake the goods from him, in which case the purchaser may recover from the auctioneer or broker the purchase money paid, upon the implied warranty of title which accompanies every sale of personal property. To permit the true owner to recover the purchase money directly from the auctioneer or broker accomplishes, simply, the dual purpose of avoiding circuity of actions, and of enabling the latter to make good the implied warranty of title to the purchaser, who, by such recovery, acquires for the first time the title to the goods purchased, and which title the auctioneer or broker impliedly warranted in making the sale. But no ground exists for holding the auctioneer or broker liable in any case in which the true owner is without recourse against the purchaser, except, of course, where the auctioneer or broker was chargeable with fault or notice.

The Principle Determining This Case.

The proposition is now recognized as elementary that, wherever the act, conduct or omission of one party has led to such alteration in the position of another that, if the truth in respect thereto be shown, such other party will be damaged, the first party is thereby estopped to show the truth, however much he may be damaged by such estoppel, whether his fault consisted of fraud, misrepresentation, negligence or over-confidence in another.

The rule "has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the statute of limitations, it is a conservator, and without it society could not well go on." Daniels vs. Tearney, 102 U. S., 415, 420.

Where one of two innocent persons must suffer the loss occasioned by the wrongdoing of a third, the one who by his negligence or inadvertence has placed it in the power of the wrongdoer to perpetrate the wrong which would not otherwise have been done, must suffer the loss, rather than the other innocent party. Leather Mfg. Bank vs. Morgan, 117 U. S., 96, 109-10; Fifth Congregational Church vs. Bright, 28 D. C. App., 229; Commercial Nat. Bank vs. Compress and Warehouse Co., 133 Fed. Rep., 501, 504.

> "There is no rule of law of which the equity is more manifest, or which is better sustained by reasons of public policy, than that which casts a loss, resulting from the fraud of a third person, upon the party who, by employing and entrusting such person, enabled him to commit it." Fatman vs. Lobach, 1 Duer, 354, 361.

> "The owner of the stock should be relegated for his remedy to the unfaithful agent whom he trusted, who asserts that he is amply able to respond, and upon whom there has been no demand. The plaintiff should not suffer loss in innocently parting with his money under the circumstances, and upon apparent evidence of title presented by the fraud of Ritts, and made possible, accepting the defendant's story, by his own negligence and misplaced confidence." Talcott vs. Standard Oil Co., 149 App. Div. (N. Y.), 694.

> "If the defendants placed undue confidence in Michaels, it is but the familiar case of imposing the burden upon him who unwisely or unguardedly reposed the confidence." Armour vs. R. R. Co., 65 N. Y., 111, 122-4.

> "When the owner of property in any way clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him,

they should be protected." Cowdrey vs. Vandenburgh, 101 U. S., 572, 574.

Although frequently termed estoppel *in pais*, or equitable estoppel, it is equally available at law and in equity. Dickerson vs. Colgrove, 100 U. S., 578; Kirk vs. Hamilton, 102 U. S., 68, 77; Leather Mfg. Bank vs. Morgan, 117 U. S., 96; Drexel vs. Berney, 122 U. S., 241, 253; Wehrman vs. Conklin, 155 U. S., 314, 327; Green vs. Grigg, 98 App. Div., 445.

By common consent, the leading case upon the question under consideration is McNeil vs. Tenth Nat. Bank, 46 N. Y., 325. In it, a blank power of attorney and assignment were executed by the owner of corporate stock, and the stock delivered as security for an indebtedness to a firm of stockbrokers who subsequently became insolvent, after having pledged the shares with a bank to secure an indebtedness of their own. The court held that while, as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he himself has, this is a truism predicable of a simple transfer from one party to another where no other element intervenes, and which does not interfere with the well-established principle that, where the true owner holds out, or allows another to appear as the owner, or as having full power of disposition, and innocent third parties are thus led into dealing with such apparent owner, they will be protected; that their rights do not depend upon the actual title or authority of the party with whom they deal, but are derived from the act of the real owner, which estops him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he has caused or allowed to appear to be vested in the party making the conveyance; that, while simply entrusting the possession of a chattel to another is insufficient to preclude

the real owner from reclaiming his property in case of an unauthorized disposition of it, yet if the owner entrusts, not merely the possession, but also written evidence of title thereto, and of an unconditional power of disposition, the case is vastly different,—there is no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary or under contingencies to arise, and, if the contingencies are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case can not be distinguished from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power; that the holder of such a certificate and power as was given in that case [as in this] possesses all the external indicia of title and an apparently unlimited power of disposition; and that, by leaving the certificate in the hands of his brokers, accompanied by such an instrument, he in fact substituted his trust in the honesty of his brokers for the control which the law gave him over his own property, and the consequences of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers whose money the brokers were thereby enabled to obtain.

That this case is not distinguishable from the case at bar seems scarcely to be disputed in the opposing brief. Here, as there, the plaintiff placed into the hands of the wrongdoer the stock certificates in such form as allowed him to appear the owner thereof, with full power of disposition; here, as there, there was no occasion for the delivery of the certificates unless it was intended that they should be used by the depositary for the purpose of making transfer of the plaintiff's title; here, as there, the contingency upon which it was to be used might have been expressed on the face of the instrument, but, instead, was permitted by the plaintiff to remain in confidence between

itself and the depositary; here, as there, the case cannot be distinguished from that of an agent who receives instructions qualifying or restricting an apparently absolute power; here, as there, the person, constituted by the act of the plaintiff the holder of the certificate and power of attorney, was given all the external indicia of title and an apparently unlimited power of disposition, and here, as there, by placing the certificates in the hands of its agent, accompanied by the blank assignment, the plaintiff in fact substituted its trust in the honesty of that agent for the control which the law gave it over the certificates, the consequences of a betrayal of which trust should fall upon the party who reposed it, rather than upon innocent strangers, whether purchasers or brokers, with whom the plaintiff's depositary or agent was thus by itself enabled to deal.

The only answer, seemingly, of the plaintiff in error to McNeil vs. Tenth Nat. Bank, is Knox vs. Eden Musee Co., 148 N. Y., 441, which is relied upon as overruling or at least as distinguishing McNeil vs. Tenth Nat. Bank from cases like the present. On the contrary, we submit, there is no conflict whatever between the two cases, and the only distinction between them is one of fact, namely: In the McNeil case, the plaintiff had voluntarily placed his stock certificate, assigned in blank, in the hands of his brokers, who had thereafter wrongfully hypothecated it; while in Knox vs. Eden Musee Co. the defendant had not voluntarily placed its stock certificates in the hands of the wrongdoer, but the latter had stolen them from the defendant's safe, to which he had a key, and therefore access. The ground of the court's decision, as quoted at p. 30 of the plaintiff's brief, is, the italics being ours, that "the employment of a servant to whom is entrusted the master's property, *with no power of disposition*, is not alone such a putting of trust and confidence in the servant by the master

as to enable the latter by his wrongful act to defeat the master's title." In the case at bar, the certificates were entrusted to the servant *with* the power of disposition, being given him for the express and only purpose of transferring the title thereto to Kelly, and thereby divesting the title owned by it, and in respect to which it now sues. If, in McNeil vs. Tenth Nat'l Bank, the brokers had merely been given access to a box in which the plaintiff kept his stock certificates, and had stolen them therefrom, the case would have been analogous to Knox vs. Eden Musee Co.; while if, in the latter case, instead of being merely afforded access to the box in which the certificates were kept, they had been put by the Eden Musee Company into the wrongdoer's hands for delivery to Kelly, and he had sold them to an innocent third person instead, there can be no question that the doctrine of McNeil vs. Tenth Nat'l Bank would have been applied.

This distinction is recognized in the quotation printed at p. 32 of plaintiff's brief from the opinion in East Birmingham Land Co. vs. Dennis, 85 Ala., 565, which was another case of a certificate stolen from the vault of a bank, the italics being those which appear in the brief for the plaintiff in error: "There is a class of cases, *not to be confounded with the one in hand*, where the holder of such a certificate of stock, endorsed in blank, is clothed with power as agent or trustee *to deal with such stock to a limited extent*, and transfers it by exceeding his powers, or in breach of his trust"—a case in all respects like the one at bar, in which Myers was by the plaintiff placed in possession of the certificates, endorsed in blank, and was clothed with power as its agent or trustee to deal with them to a limited extent, namely, the extent of transferring the title thereto by delivery to Kelly, and who transferred it otherwise by exceeding his powers and in breach of his trust. The quotation from the opinion continues: "In such cases,

it has often been held that the true owner, having *conferred on the holder by contract* all the external indicia of title, and *an apparently unlimited power of disposition* over the stock, 'is estopped to assert his title as against a third person, who, acting in good faith, acquires it for value from the apparent owner,'" citing, among other cases, McNeil vs. Tenth National Bank. The rule thus stated is unquestionably correct, and we submit is conclusive of the present case.

The case of Schumacher vs. Green Cananea Copper Co., 134 N. W. Rep., 510, already referred to and much relied upon in the opposing brief (pp. 33-5), is entirely similar in character. There, as stated, the plaintiff had deposited, as collateral to secure a loan, a certificate of stock, endorsed in blank, with the First National Bank of Ironwood. The court found (plaintiff's brief, p. 35) that the bank was a national bank in good standing, and that the pledging of stock certificates as security for loans at banks is so common and extensive in the business of the world that no one questions the care and prudence of one thus entrusting his stocks with them as collateral, it being customary, and perhaps necessary, to deposit them so endorsed. The cashier, as stated by the opposing brief, had stolen from the bank the security in controversy and sold it through a broker to an innocent purchaser. The court held, first (plaintiff's brief, p. 34), that if the bank, *i. e.*, the party to whom the plaintiff entrusted the certificate, had sold it, the purchaser would have taken a good title, "for the weight of authority is that where, by a wrongful or unauthorized act, two innocent persons have been placed in a situation where a loss must be borne by one of them, it falls on the one who first trusted the wrongdoer, and put in his hands the means of inflicting the loss. Scollans vs. E. H. Rollins & Sons, 179 Mass., 346; 88 Am. St. Rep., 386; 60 N. E., 983; East

Birmingham Land Co. vs. Dennis, 85 Ala., 565; 2 L. R. A., 836; 7 Am. St. Rep., 73; 5 So., 317. But the court found that the act of abstracting and selling the certificate was not the act of the pledgee bank, but of one of its officers, for a purpose personal to him. In our opinion this finding is abundantly supported." In the second place, the court held that, in pledging the certificate endorsed in blank with the bank, the plaintiff was not negligent; and, in the third place, that the plaintiff, having "dealt with and entrusted the bank —not any of its officers," the cashier, who abstracted it, was to be regarded as an "intermeddler and outsider," unless the disposition of the property was the act of the corporation. But suppose, in this case of Schumacher vs. Green Cananea Copper Co., the bank had delivered the stock certificate to its cashier, so endorsed as to confer upon him all the indicia of ownership and power of absolute disposition, for the purpose of having him deliver it to a third person, in breach of which misplaced confidence he had sold it through the broker. Is it not plain that the title to the purchaser would have been upheld? Especially where the question arose, not in an action by the owner, but, as it does here, between the bank and an innocent third party?

At pp. 36-7, the learned counsel for the plaintiff in error lay down three elements which, according to their own contention, are necessary to enable the owner to recover in an action like the present, namely:

1. That "*the possession of the document by the wrongdoer is obtained without the knowledge or consent of the owner of the instrument, and there is no voluntary surrender thereof to the former.*"

In the case at bar, the stock certificates were voluntarily placed in the hands of Myers by the secretary of the plaintiff company, in the ordinary, regular course of his duties

and of the prosecution of the business of the bank. In other words, since the plaintiff is a corporation, which can only act through its duly constituted officers, in the performance of their duly assigned duties, the certificates were voluntarily placed by the plaintiff in the hands of Myers.

2. *"Before the wrongdoer can obtain possession of the document, a criminal act such as larceny, or a taking away without consent is necessary, as distinguished from the possible use of a technical criminal act by way of fraud to induce a 'voluntary surrender' of possession of the instrument."*

Here, Myers did not obtain possession by larceny or a taking away without consent, but, in the terms of the element or proposition laid down by opposing counsel, he made use, simply, of a possible criminal act "by way of fraud to induce a voluntary surrender of possession of the instrument."

3. *"The criminal act is the 'proximate cause' of the loss or conversion of the document; or, in other words, is the proximate cause of the opportunity afforded the wrongful holder of the instrument to transfer it to an innocent purchaser or pledgee."*

In the present case, the criminal act was the sale of the stock certificates, *after* they had been voluntarily placed in the hands of Myers by the plaintiff.

It is argued, at pp. 40-1 of plaintiff's brief, that Myers' possession of the certificates was constructively the possession of the plaintiff until he left its premises for the offices of the broker, and, therefore, his manual possession being the company's possession, the latter can in no sense be said to have "entrusted the certificates to another," or to a "third person." If this distinction is sound, then any principal who entrusts his certificates, endorsed in blank, to his broker to negotiate a loan for him, may recover them from

any innocent third person to whom they may be sold by the broker in breach of the confidence reposed in him by the owner;—the broker's possession is constructively that of the owner, unless and until the certificates are pledged, and the owner has never entrusted their possession to the broker at all. The possession of the agent, is, always, constructively that of the principal; but this fact has never been held to exclude the rule that, where either the principal or some other equally innocent person must bear the loss of the agent's fraudulent conduct, its burden shall fall upon him whose misplaced confidence gave the agent the opportunity to defraud.

Nor can the plaintiff's case be aided by the supposed analogy of a case in which Myers had been given access to the safe, and by means of such access had abstracted the certificates and converted them to his own use, thereby, under the doctrine of Knox vs. Eden Musee Co. and of similar cases cited, stealing them. Here, they were placed in his possession by the plaintiff, for the purpose of disposing of them in the line of its business, and for its purposes. Conceding for the purposes of argument that the manner in which he disposed of them was larceny, this *followed* possession, gained through misplaced confidence and not by theft. Nor does the rule which imposes the loss upon him who reposed the mistaken confidence require, as suggested at p. 43 of the brief, that the confidence was negligently given;—to do so would be to abrogate the rule. Neither in McNeil vs. Tenth Nat'l Bank, nor in any one of the long series of cases which have adopted its doctrine, was the owner held liable because of negligence in selecting his broker, his agent, or his depositary of the securities. Nor is the distinction, attempted to be drawn at p. 47 of the brief, between delivery of the certificates to a broker for an act to be performed at his office, and their delivery to

Myers for an act to be performed in the office of the plaintiff, capable of being sustained upon any principle. In either instance, the case is one of loss through the misplaced confidence of the plaintiff in an agent, which must fall either upon itself, or upon another equally innocent, and less responsible for the fraud.

Returning to McNeil vs. Tenth Nat. Bank, the application of which to the present case is pointed out at pp. 13-14, *supra*, it has been cited, approved and followed in the following among other cases; Cowdrey vs. Vandenburgh, 101 U. S., 576; Driscoll vs. Mfg. Co., 59 N. Y., 96; Armour vs. R. R. Co., 65 N. Y., 111, 122-4; Bank vs. Livingston, 74 N. Y., 223; Simpson vs. Del Hayo, 94 N. Y., 189, 194; Brady vs. Bank, 65 App. Div. (N. Y.), 212; Lyman vs. Bank, 81 App. Div. (N. Y.), 367, 371; McLean vs. Griot, 118 App. Div. (N. Y.), 100; Talcott vs. Standard Oil Co., 149 App. Div. (N. Y.), 694; Andrews vs. R. R. Co., 159 Mass., 64; Bank vs. Dewar, 6 Ill. App., 294; affirmed 115 Ill., 22; McCarthy vs. Crawford, 238 Ill., 38; Moore vs. Bank, 55 N. Y., 41.

In Moore vs. Bank, *supra*, the rule laid down in McNeil vs. Tenth Nat. Bank is upheld on three grounds, namely:

(1) It is contrary to justice and conscience to permit one who has clothed another with the indicia of ownership and power of disposition, to assert his real title against an innocent purchaser; (2) any other rule would open the door for the perpetration of frauds upon purchasers from such apparent owners; and (3) such circumstances present a proper case for application of the legal maxim that, where one of two innocent persons must sustain a loss through the fraud of a third, such loss should fall upon the one whose act has enabled the fraud to be committed.

The principle of McNeil vs. Tenth Nat. Bank has been declared, though the case is not cited, in Fatman vs. Lobach, 1 Duer, 354, 361; Del Fosse vs. Bank, 98 Ill. App., 123;

5th Nat. Bank vs. R. R. Co., 137 N. Y., 231, 238; Johnson vs. Milmine, 150 Ill. App., 208, 218—the first of these cases being much older than the McNeil case.

In Cowdrey vs. Vandenburgh, 101 U. S., at p. 576, this court cites and approves McNeil vs. Tenth Nat'l Bank for the proposition that "the rights of innocent third parties * * * 'do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence,'" —*i. e.*, through either—" 'he caused or allowed to appear to be vested in the party making the conveyance.'"

And the foregoing has long been the recognized rule in this District, upon the authority of the cases cited. Strong vs. District of Columbia, 4 Mack., 252-3; Nat. Sav. & Trust Co. vs. Gray, 12 D. C. App., 276—the last named case citing, also, Johnston vs. Laflin, 103 U. S., 804.

Other cases in New York are Leitch vs. Wells, 48 N. Y., 585; Holbrook vs. New Jersey Zinc Co., 57 N. Y., 616; Cushman vs. Jewelry Co., 76 N. Y., 365; Talmage vs. Bank, 91 N. Y., 531; while Laughlin vs. District of Columbia, 116 U. S., 485, is another case in this court which proceeded upon the same principle.

In O'Herron vs. Grey, 168 Mass., 573, cited by the plaintiff, the guardian of two infants had deposited certificates for shares of stock with a national bank for safekeeping, upon which she afterwards borrowed money from the bank for her personal use, endorsing on the certificates a blank form of transfer, signed with the names of the infants by herself as guardian. A few days later the cashier, one Francis, who had access to the vault where the certificates were kept, but, in so far as the report shows, had

no duty or authority in connection with them, took them from the vault, without authority from anyone, and delivered them to the defendants as security for a debt of his own—the case being thus analogous in all respects to Schumacher vs. Green Cananea Copper Co., *supra*. Thereafter the defendants presented the certificates to the company which had issued them, and applied for a transfer, which the corporation declined to make without a decree of the Probate Court authorizing sale of the stock, whereupon Francis presented a petition to the Probate Court for such leave, which he signed "Catherine O'Herron, Guardian, by E. L. Francis," without the authority of the guardian; and a decree in the usual form, authorizing sale or transfer of the whole or any part of the stock, was thereupon passed and the transfer made. The suit was by the wards against the person who had loaned money to Francis upon the stock, and they were held entitled to recover on the grounds, first, that the signature of the guardian on the back of the certificates disclosed the trust relationship, which was sufficient to put the defendants upon inquiry; secondly, that the decree of the Probate Court did not help defendant's case, first, because it was not passed until long after the transfer to him had been made; secondly, because it authorized a sale of the stock, and not a pledge of it—still less a pledge for the benefit of others than the plaintiffs, and, thirdly, because the Probate Court had acquired no jurisdiction of the case by the unauthorized signature and appearance of Francis.

Scollans vs. Rollins, 179 Mass., 346, another authority cited by the plaintiff, was twice before the Supreme Judicial Court of Massachusetts. When first there (173 Mass., 275) the decision was, only, that, where bonds bearing a blank assignment were deposited in the safe of a firm for safekeeping, merely, and one of its members afterwards ab-

stracted and pledged them as security for a loan to his firm, the fact that the assignments were in blank, *in the absence of evidence of custom or usage* that certificates so endorsed passed from hand to hand without inquiry as to the right of the bearer to dispose of them, created the presumption that they were intended only to aid the owner in securing their registration. Upon the second trial of the case, the evidence of the custom referred to was adduced, whereupon the case was again taken up and the judgment affirmed (179 Mass., 346), the court declaring (pp. 352-3) that, if such certificates should be stolen, even a *bona fide* subsequent holder would have no claim to them, but that, "if the owner of the instrument intrusts it to another, he does so charged with notice of the power to deceive which he is putting in that other's hands, and, if loss follows, he must bear the burden."

This was followed by Russell vs. Telephone Co., 180 Mass., 467, in which the same doctrine is declared and applied notwithstanding the fact that the rightful owner was an aged woman, unfamiliar with business *and unacquainted with the custom in question;* and notwithstanding the further fact that the fraudulent act was, it was claimed, theft under the laws of Massachusetts. The certificate had been signed in blank and delivered to the agent solely for the purpose of surrender to the company so that a new certificate could be issued to the owner, including some additional shares to which she was entitled; the agent, as in the case at bar, having from the beginning sought and obtained it for the purpose of its wrongful conversion. The court, by Mr. Justice Holmes, C. J., said:

> "The plaintiff's intestate entrusted a certificate of stock, endorsed in blank, to a fraudulent agent, and he, instead of using it for the purpose for which it was entrusted to him, obtained an advance from the

defendant by giving the certificate in pledge. The case, therefore, so far falls within the general reasoning of Scollans vs. Rollins, 179 Mass., 346, and the usage referred to in that case was found to be proved. In order to avoid the intimations of Scollans vs. Rollins, the plaintiff sets up that, in this case, only the possession of the certificate, not the property, passed to the agent, and that, as the possession was obtained by fraud, it was obtained by larceny in judgment of law. In Scollans vs. Rollins, it is admitted that the general principles there laid down would not apply to an instrument endorsed in blank, and stolen before it had been transferred. We shall not examine the premises of this difference, because we could not accept the conclusion. The qualification of the rule, as not applying when the instrument is stolen, was not based upon the name of the agent's crime, but upon the fact that, in the ordinary and typical case of theft. the owner has not entrusted the agent with the document and, therefore, is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough, if the estoppel is based upon the principle that, when one of two innocent persons is to suffer, the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But, in a case like the present, the agent has been entrusted with the converted property, and it is totally immaterial whether, by a stretch which extends larceny beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present. and the estoppel arises. The distinction is not new. On the one side are cases like Knox vs. Eden Musee American Co., 148 N. Y., 441, where an agent or servant simply had access to a document temporarily in the possession of the owner; on the other, cases like Pa. R. R. Company's Appeal, 86 Penn. St., 80, where possession is entrusted to an attorney for one purpose and he uses it for another. It cannot matter in the latter case that the agent intended the fraud

> from the outset. (Citations.) It is found by the court that the testatrix did not know of the custom, and, if the question before us was the construction of a contract, her knowledge might be important. But she knew that she was putting into her agent's hands an instrument which made actual deceit possible, and it is not argued for the plaintiff that, under such circumstances, considering the nature of the usage which has been adopted as law in many jurisdictions, she did not take the risk of the appearances being interpreted as it is usual for business men to interpret them."

It will be noted that the certificate, in this case of Russell vs. Telephone Co., was delivered by the owner to her agent, whose possession was constructively hers in the fullest sense that the possession of Myers in the case under consideration was the possession of the plaintiff. The agency, in the case cited, was to surrender the certificate for the purpose of securing a new one; in the case at bar, it was to surrender the certificates to the former owner, upon obtaining from him payment of the amount of his indebtedness to the plaintiff. But, notwithstanding the attempt to distinguish the two cases at pp. 46-7 of the brief for plaintiff, it is, we submit, impossible to find that the agent in the one case "was clothed with the power to use them as his own" in any sense in which the agent in the other case was not equally so clothed.

Russell vs. Telephone Co. was followed by Gardiner vs. Trust Co., 190 Mass., 27, which was the case of overdue, non-negotiable paper, obtained through fraudulent representations by an agent, who assigned it to a Trust Company to secure his own debt, to which case the court applied "the rule that, where one of two innocent persons must suffer in consequence of the fraud of another, the loss must

fall upon the one who by his trust and confidence has enabled the perpetrator of the fraud to commit it. (Citations.)"

This case was followed by Baker vs. Davis, 211 Mass., 429, decided in March, 1912, and therefore subsequent to Schumacher vs. Green Cananea Copper Co., *supra*. "The case falls within Scollans vs. Rollins, 179 Mass., 346, and Russell vs. Telephone Co., 180 Mass., 467. The principle of law established by these cases is that, if the owner of stock knowingly places in the hands of another the certificate therefor, either indorsed in blank or by a separate instrument of transfer or power of attorney, the person to whom the certificate and instrument are delivered can pass a good title by delivery or pledge, regardless of the relation between him and the owner. This is not on the ground that a certificate becomes a negotiable instrument, but on the ground of estoppel, because the owner, having given to another such indicia of title as clothes him with the appearances of ownership, is precluded from setting up title in himself as against the holder in good faith."

In Penna. R. R. Co.'s Appeal, 86 Pa. St., 80, cited and approved in Russell vs. Telephone Co., *supra*, an executrix deposited with her legal adviser for safekeeping, only, a certificate of stock, the power of attorney on the back of which had been assigned by the decedent thirteen years before. The lawyer pledged the certificate as collateral security for his own debt. Judge Sharswood was of opinion that the age of the power of attorney was sufficient to arouse suspicion, but held, nevertheless, that "there was negligence on the part of the appellee. As executrix, she placed the certificate in the hands of Creeley, as her attorney, with the blank powers indorsed, uncancelled. Thus, by her act, he was enabled to commit this fraud. The equities of the respec-

tive parties are not equal. Where one of two parties, who are equally innocent of actual fraud, must lose, it is the suggestion of common sense, as well as equity, that the one whose misplaced confidence in the agent or attorney has been the cause of the loss, shall not throw it on the other."

There can be no question, that, in the case last cited, the possession of the attorney was constructively that of his client or principal.

In Railway Co. vs. Bank, 56 Ohio St., 351, 388, the court said: "No man appoints an agent to do a wrong, and if, the moment an agent transcends his authority, his relation to his principal ceases, when can a principal be held for a wrongful act? * * * The recent case of Knox vs. Eden Musee Co., 148 N. Y., 441, needs to be noticed. In that case, it will be observed that Jurgins, the wrongdoer, was not the agent of the company to issue or transfer stock. His employment was simply to cancel surrendered stock. * * * This broadly distinguishes the case from the one before us. No disposition is shown to modify the doctrine of the same court as announced in many previous cases, as to the liability of a corporation for the acts of the agents done within the scope of their employment, although not only negligently, but even fraudulently done, and contrary to the purpose and instructions of the company."

Board of Education vs. Sinton, 41 Ohio St., 504, is, if anything, even less pertinent than Knox vs. Eden Musee Co. In it the Board, a public corporation, had taken up certain of its bonds and delivered them for cancellation to Davis, one of its members, who fraudulently reissued them. The holder was held not entitled to recover, on three grounds: First, because, as in the Eden Musee case, the bonds were not put in the hands of Davis to issue or re-

issue, but solely for the purpose of cancellation, and his act, therefore, was not within the scope of his agency; secondly, because the Board of Education, under the terms of the statute creating it, had no power to reissue the bonds, and, therefore, a *bona fide* purchaser could not take any rights, because such reissue, even if authorized by it, would have been absolutely void, and, thirdly, because, under the facts of the case, the court found that the holder was not an innocent purchaser.

Hill vs. Jewett Publishing Co., 13 L. R. A., 193, cited by appellant, holds, simply, that the forgery of the necessary signature of the treasurer to certificates of stock by the president of a corporation, whose only authority as to their issue was to sign them, does not make the corporation liable therefor to holders who take them in private and personal transactions with the president.

Farmers' Bank vs. Diebold Safe & Lock Co., 66 Ohio St., 367, also cited by the plaintiff, is expressly distinguished by the court from cases like the present. In it, the secretary and treasurer of the corporation held a certificate for fifty of its shares, which was legal, valid and regular, and which certificate he assigned to the corporation, in blank, on the demand of the president, who placed it in a safe of the company, accessible to both. Becoming lost, a new certificate was issued, and sold for payment of the indebtedness. Subsequently, the secretary and treasurer found the original, lost certificate, and pledged it as collateral security for a loan to himself. The court said: "The facts do not make a case where the owner of property has put it in the possession of another, with indicia of ownership, so as to invoke the rule that, where one or two innocent persons must suffer by the act of a third, he who has enabled the former to occasion the loss, must sustain it. The company, when it became the equitable owner of the stock, placed it in the drawer of its president. It did not

place it in the possession, real or constructive, of Tyler. * * * This is the case of a stolen certificate."

Returning to the classification, or "heads," of plaintiff's brief, at pp. 36-7, given as determinative of the question whether the plaintiff is or is not entitled to recover, we find the following:

1. There is no right of recovery if the stock certificates were voluntarily placed by the plaintiff in the hands of Myers, in such condition as to clothe him with the indicia of ownership, and to enable him to deal with the property as its owner.

2. The case falls under plaintiff's second "head," with a consequent right to recover only upon the theory that defendant obtained the certificates without the knowledge or consent of the plaintiff, or its voluntary surrender of them to him—in other words, that they were withdrawn from its possession and came into his through theft, not through its voluntary act.

The law, as thus stated by itself, is conclusive against the plaintiff. As pointed out at pp. 13-14, 17-18, *supra*, every fact and circumstance in the case combine to embrace it under the plaintiff's first "head." Not only were the certificates voluntarily placed by the plaintiff in the possession of Myers, clothing him with all the ostensible indicia of ownership, but, as conceded in the agreed statement of facts (Rec., p. 6), they were so delivered to him "in accordance with the usual course of business of plaintiff company."

The sole basis of escape from these, the unquestioned, actual facts of the case, which is contended for on behalf of the plaintiff, is that, although as the record stipulates the plaintiff, by its secretary, as an actual fact delivered the certificates to Myers, and in accordance with the usual course of its business, it did not do so theoretically, because, Myers being the note teller of the company, his possession was its

own, of which it was not deprived until Myers sold the certificates to the defendant, thereby himself obtaining possession by theft.

This suggested substitution of an artificial for the actual state of the facts would destroy the rule of estoppel applicable to all such cases. Under it, had the plaintiff delivered the certificates to Myers for the purpose of taking them to Kelly's office, and of there delivering them to him upon payment of the amount due, it would not have delivered possession to him, or parted with it, or placed confidence in him, but would still, itself, be retaining the possession, so that if, on his way, he should have pledged the stocks with a bank for his own debt, or sold them to an innocent purchaser, his possession for the purpose would have been a possession gained by theft, and the title of the plaintiff would not have been affected.

In Pa. R. R. Company's Appeal, 86 Pa. St., 80, cited *supra,* as, also, in Ambrose vs. Evans, 66 Cal., 74, the owner having deposited the certificate with an attorney, or agent, for safekeeping, only, it was still in her possession, from which she parted only through theft on the part of the attorney or agent, and the pledgee of the latter could have taken no title. In Russell vs. Tel. Co., 180 Mass., 467, the owner having delivered the certificate to her agent solely for the purpose of surrender to the company, it remained in her possession until so surrendered—its possession was not entrusted by her to the agent, but was obtained solely by stealing it, in his individual capacity, from himself in his capacity as agent, so that his pledgee took no title as against her. The distinction is not attempted to be supported by any authority, and, we submit, is altogether too artificial for the practical affairs of life.

The Attempted Distinction Between Purchasers and Brokers.

The final point of contention on behalf of the plaintiff is that, even though a *bona fide* purchaser of the stock in controversy might be able to hold it free of any claim on

behalf of the plaintiff, the broker through whom Myers effected the sale, though an equally innocent party, is nevertheless civilly liable to the same extent as is Myers himself. The only authorities cited in support are Kimball vs. Billings, 55 Me., 147, and Swim vs. Wilson, 90 Cal., 126, both of which were cases of the sale of *stolen* property, sold through the agency of an innocent third person. The principle under which, in cases of this kind, the broker or auctioneer is held liable, has been considered *supra,* at pp. 9-10. In the first place, since the owner of stolen goods has not lost them through either his negligence or his mistaken confidence, the rule under consideration is in no way presented in such a case; and, in the second place, since the auctioneer or broker would be liable to the purchaser under the implied warranty of title attending sales of personal property, there is no hardship, but only the avoidance of circuity of action, in permitting the owner to recover the value of the goods from him, and thereby give effect to the sale which the law holds him to have warranted.

That general expressions in an opinion are to be read in the light of the point decided in the case, and are not permitted to control the decision in other suits, where not essential to the points decided, is familiar. Wetmore vs. Karrick, 205 U. S., 141, 155; Harriman vs. Northern Securities Co., 197 U. S., 244, 291.

The contention is equally barren of support in principle. Why should the innocent person who has neither by negligence nor by misplaced confidence contributed to the misadventure be relieved if a purchaser, but, though an equally innocent broker or auctioneer, be required to relieve the person whose negligence or mistaken confidence gave opportunity for the fraud? It is the one of two equally innocent *"persons,"* without responsibility in the matter, who is relieved, under the very terms of the rule, which does not limit itself to purchasers.

Swim vs. Wilson is followed by Brittain vs. Bank, 12 Cal., 282, in which the rights of the owner of a certificate of stock, endorsed in blank, who had delivered it to his agent by whom it was fraudulently applied to his own uses, were held subordinate to the rights of the pledgee, in conformity it is believed, with the unanimous current of authority upon the subject.

> "We hold that, when on the face of a certificate absolute ownership appears in him who has possession of it, and there is no evidence outside showing actual or constructive notice that the ownership is in another, the party taking such certificate for value takes title thereto. *Where a loss results, the owner who puts it in the power of another to deal with the instrument as his own, must bear the loss.*" Westinghouse vs. Bank, 196 Pa. St., 249, 254.

> "Another, equally innocent, dealt with one of the men to whom he [the plaintiff] had entrusted his stock, with all the indicia of ownership; and, when one of these two innocent persons is to suffer, the rule, as everywhere recognized, is that, where one by his own act arms another with power to act for him, he who so armed the wrongdoer must suffer the consequences of the wrongdoing." Shattuck vs. Cement Co., 205 Pa. St., 197.

There is no conceivable reason why this principle is not applicable to all classes of innocent persons, dealing with the agent whom the owner has armed with the power to act, instead of being applied to innocent purchasers, only.

It is respectfully submitted that there was no error in the judgment below, and that it should be affirmed.

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